No. 2397

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

FILMER BROS. CO., PRINT, 330 JACKSON ST., S. F., CAL.

No. 2397

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

876

879

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

Index.

Index. Page

Names and Addresses of Attorneys.

ROBERT S. HOLT, Esquire, #714 Tacoma Building, Tacoma, Washington, and

U. E. HARMON, Esquire, #714 Tacoma Building, Tacoma, Washington,

Attorneys for Plaintiff in Error.

L. B. da PONTE, Esquire, N. P. Headquarters Building, Tacoma, Washington, and

J. W. QUICK, Esquire, N. P. Headquarters Building, Tacoma, Washington,

Attorneys for the Defendant in Error.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1739–C.

THE FRANKFORT MARINE ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,

Defendant in Error.

Stipulation [as to Printing Record].

In the above-entitled action, it is hereby stipulated and agreed, by and between the parties thereto, that in printing the record in this case the Clerk shall print:

1. Amended complaint, but not the exhibits thereto.
2. Amended answer to amended complaint.

3. Reply to amended answer to amended complaint.
4. Trial record.
5. Verdict.
6. Judgment.
7. Petition for a new trial.
8. Order extending time to file bill of exceptions.
9. Order overruling petition for a new trial.
10. Assignment of errors.
11. Petition for writ of error.
12. Order on petition, fixing bond, etc.
13. Order approving bond and allowing writ.
14. Bond.
15. Bill of exceptions.
16. This stipulation.
17. Writ of error. [1*]
18. Citation.

That the Clerk shall not print the caption or the endorsements on the papers and proceedings except the filing mark of the Clerk.

R. S. HOLT and
U. E. HARMON,
HUDSON, HOLT & HARMON,

Attorneys for The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error.

J. W. QUICK,
L. B. da PONTE,

Attorneys for John B. Stevens & Company, a Corporation, Defendant in Error.

(Filed Mar. 5, 1914.) [2]

*Page-number appearing at foot of page of original certified Record.

In the Circuit Court of the United States for the Western District of Washington, Western Division.

No. ——.

JOHN B. STEVENS & COMPANY,

Plaintiff,

vs.

THE FRANKFORT MARINE ACCIDENT & PLATE GLASS INSURANCE COMPANY,

Defendant.

Amended Complaint.

The amended complaint of the plaintiff for cause of action against the defendant alleges:

I.

That plaintiff is a corporation organized under the laws of the State of Washington, and has complied with all of the laws of said State, and has paid its license fee last due and is licensed to do business in this state, and was at the time of the commencement of this action and at all other times hereinafter referred to.

II.

That defendant is a corporation organized under the laws of the German Empire with power and authority to do an insurance and indemnity business, and to issue policies or contracts of indemnity indemnifying employers from legal liability and loss on account of personal injuries received by their employees, in consideration of premiums paid therefor.

III.

That on or about the 17th day of November, 1908, in consideration of a premium of $73.00 paid by plaintiff, defendant executed and delivered to plaintiff a certain contract [3] of insurance or indemnity, wherein and whereby defendant agreed and bound itself to indemnify plaintiff against loss arising from legal liability for damages on account of bodily injuries or death suffered by any employee of plaintiff resulting from any and every accident of whatsoever nature or cause happening in, upon or about the premises and in the business of plaintiff, not to exceed, however, the sum of $5,000.00 for injury or death or any one employee, for the full period of one year from date of said policy, to wit, for the period commencing the 17th day of November, 1908, and ending the 17th day of November, 1909. And said policy further provided that in case of legal proceedings to enforce a claim against plaintiff covered thereby, that defendant would, at its own expense, undertake the defense of the same. And said policy is hereby referred to attached hereto as Ex. "B" and made a part hereof as fully as if set out herein.

IV.

That while said policy was in full force and effect and on to wit, July 19, 1909, one I. B. Merrill, an employee of plaintiff, was injured, in, upon and about plaintiff's place of business, in the discharge and prosecution of his duties, and said injury was covered by and within the terms of said policy, and plaintiff was and is fully indemnified by the provisions there-

of. That subsequently, to wit, on or about the 29th day of October, 1909, said I. B. Merrill commenced an action against plaintiff in the Superior Court of Pierce County, Washington, seeking to recover damages from plaintiff on account of the injuries received in said accident, as will more fully appear from his complaint filed in said cause, a copy whereof is hereto attached and made a part hereof, marked Ex. "A." [4]

V.

Plaintiff further alleges that upon the commencement of said action of I. B. Merrill against John B. Stevens & Company immediate notice thereof was given to defendant and summons and complaint served therein was delivered to defendant, with request to defend and care for the same as provided by said policy of insurance, but defendant wrongfully and without cause repudiated all liability upon its said contract and refused to accept said accident or to defend the same at its costs unless plaintiff would release it from liability for any judgment that might be rendered therein, and plaintiff was thereby forced to and did defend said action at its own costs, and thereby incurred and paid the reasonable and necessary sum of $1,072.95. That said action was tried in said court and resulted in a verdict and judgment against plaintiff and in favor of I. B. Merrill in the sum of $6,000.00 and over, and upon appeal to the supreme court of the State of Washington said judgment was affirmed, and thereafter plaintiff was forced to and did pay off and satisfy the same in full, including costs and the sum of $250.00 inter-

est accruing on said judgment pending appeal, which sum is included in and a part of said sum of $1,072.95, and said sum, amounting to $6,072.95 is still due plaintiff from defendant in accordance with the terms and provisions of said policy of insurance.

VI.

Plaintiff further alleges that it duly performed each and everything *thing* required of it by said contract, and fully complied with all the terms thereof, but defendant wrongfully fails and refuses to comply therewith on its part, to plaintiff's damage in the sum of $6,072.95. [5]

WHEREFORE plaintiff prays judgment against defendant in the sum of $6,072.95, interest and costs.

L. B. da PONTE,
Attorney for Plaintiff.

(Verification.)
(Exhibits "A" and "B" attached.)
(Filed Aug. 4, 1911.) [6]

Amended Answer.

Comes now the defendant in the above-entitled action, and for answer to the amended complaint of the plaintiff therein:

I.

Answering paragraph III thereof, defendant denies that for the consideration therein referred to, it executed and delivered to plaintiff a contract of insurance, or indemnity, whereby it agreed and bound itself to indemnify plaintiff in the manner set forth in the said paragraph, and whereby it agreed to undertake, at its own cost, the defense of the legal

proceedings to enforce a claim against the plaintiff in the manner set forth in the said paragraph; but defendant alleges that the said contract of insurance, or indemnity, provided, as a condition precedent to its indemnifying plaintiff against the said loss arising from legal liability, as well as the defense of the legal proceedings, therein referred to, at its own expense, that the plaintiff, upon the occurrence of an accident, whether any claim was made with respect thereto or not would immediately, and at the latest within ten days, give notice of said accident in writing to this defendant, as provided in said policy, and as set forth in clause 11, on page 1, of Exhibit "B" to the said complaint.

II.

Answering paragraph IV of said amended complaint, defendant admits that while the said policy was in full force and effect, one I. B. Merrill, an employee of plaintiff, was injured in and upon the plaintiff's place of business and in the discharge of his duties, and as to the other allegations in said [7] paragraph contained, defendant denies any knowledge or information thereof sufficient to form a belief, except it admits that I. B. Merrill was injured on or before July 19, 1909, and except also, it denies positively that the plaintiff was, or is, fully, or otherwise indemnified on account of said accident by the provisions of the policy therein referred to.

III.

Answering paragraph V of the said complaint defendant denies that, upon the commencement of the action of I. B. Merrill vs. John B. Stevens & Com-

pany, immediate notice thereof was given to this defendant, and it denies that it wrongfully or without cause repudiated liability upon the said contract, but it admits that the summons and complaint, therein referred to, were delivered to it, and it admits that it refused to accept the accident, or to defend the said action, unless the plaintiff would release it from liability for any judgment that might be rendered therein, and as to the other allegations in the said paragraph contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of them, and each of them, except it denies positively that the sum of Six Thousand Seventy-two and 95/100 Dollars, or any other sum, is due to the plaintiff from it, in accordance with the terms and provisions of said policy, or otherwise.

IV.

Answering paragraph VI of said complaint defendant denies each and every the allegations therein contained.

AND FOR A FURTHER ANSWER to plaintiff's complaint, and as a FIRST AFFIRMATIVE DEFENSE THERETO, defendant alleges:

That the policy, or contract, or insurance, or indemnity referred to in plaintiff's amended complaint, was issued to [8] the said plaintiff in the State of Washington, and that the said I. B. Merrill, referred to in the said complaint, received the injuries therein referred to on or before the 19th day of July, 1909, and that the said plaintiff well knew that he had received the said injuries, but that, notwithstanding such knowledge, the said plaintiff did not give notice

of the said injury or the accident from which it arose, in writing or otherwise, to this defendant, or to its duly authorized representative for the locality in which the said contract was issued until the latter part of October, or the first part of November following the said accident and injury, and for this reason this defendant refused to undertake the defense of the action referred to in plaintiff's complaint, and denied any liability to the plaintiff under the said policy, or contract, on account of the said failure to file said notice, the giving of the said notice being made a condition precedent, by the term of said contract of insurance, to any obligation on the part of this defendant to either defend the suit referred to in plaintiff's complaint, or to any liability under the said contract of insurance for any loss or damage sustained by the said plaintiff on account of the said accident and injury and its legal liability for damages therefor.

AND FOR A FURTHER ANSWER to plaintiff's complaint, and as a SECOND AFFIRMATIVE DEFENSE THERETO, defendant alleges:

That the contract of insurance or indemnity, referred to in plaintiff's amended complaint, was issued to the plaintiff in the State of Washington, and that thereafter, and on or before the 19th day of July, 1911, the I. B. Merrill referred to in said complaint met with an accident and sustained the injuries referred to in said complaint, as the plaintiff well [9] knew at the time thereof; but that the same plaintiff, notwithstanding the said accident and the said knowledge, failed to give to this defend-

ant notice, in writing or otherwise, of the said accident or injury, and failed to give any such notice to its authorized representative in the locality where the said policy or contract was issued until the latter part of October, or in the first part of November following the said accident and injury, and that, by reason of the failure of the said plaintiff to give the said notice, and its failure to investigate the accident, and to preserve the testimony, the evidence became destroyed and the witnesses scattered, and, at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter, and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible to successfully defend the said action.

AND NOW, HAVING FULLY ANSWERED, defendant prays to be hence dismissed, with its costs and disbursements in this behalf expended.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant.

(Verification.)
(Filed Nov. 28, 1913.) [10]

Reply to Amended Answer to Amended Complaint.

Comes now the plaintiff and makes reply to the defendant's amended answer served herein the 26th day of November, 1913, as follows:

(1) Plaintiff denies the allegations of paragraph

1 of said amended answer.

(2) Answering paragraph II of said answer plaintiff admits that said I. B. Merrill was injured on the 19th day of July, 1909.

(3) For reply to defendant's first affirmative defense, plaintiff denies all of the allegations therein contained, except plaintiff admits that said I. B. Merrill was injured on July 19th, 1909, and that said policy of insurance was issued and delivered in the State of Washington, and is governed by the laws of said State. Plaintiff specifically denies that it knew of the accident or injury to the said I. B. Merrill on the 19th day of July, 1909, or at any other time prior to the 19th day of October, 1909 on which date it learned for the first time of the said accident by and through a communication from Fitch & Jacobs, attorneys for I. B. Merrill, and on the same day it so learned thereof it gave due notice to defendant's authorized representative for the locality in which said contract of insurance was issued, and defendant never at any time made any objection to the form or sufficiency of said notice, except only defendant fraudulently pretended that same was not given in time, and plaintiff alleges that it strictly complied with the term and conditions of said policy incumbent on it in every respect. [11]

(4) Replying to defendant's second affirmative defense, plaintiff denies all of the allegations thereof, except it admits that said I. B. Merrill was injured on the 19th day of July, 1909, but plaintiff denied that it had any knowledge thereof until the 19th day of October, 1909, at which time it gave due notice to defendant, as alleged in paragraph 3 of this reply.

Plaintiff further alleges that it was under no obligation or duty to investigate said accident, but the duty to do so was on defendant, and plaintiff denies that the evidence was destroyed or the witnesses scattered, and alleges that at the time it so gave notice of the accident to defendant every one of the witnesses was still in plaintiff's employ, and all of them testified at the trial of the Merrill action except one, and his testimony was merely cumulative, and said witness was present and available at the time said notice was given defendant, and if he afterwards left the county it was without fault of plaintiff. Plaintiff admits that a slight and immaterial alteration was made in the hopper on which Merrill claimed to have been injured, but alleges that said alteration was immaterial, was made before plaintiff knew of the accident or that Merrill claimed that said hopper was connected therewith, and in any event, said hopper and plaintiff's entire place of business was totally destroyed by fire shortly after said 19th day of October, 1909, and before said action of I. B. Merrill was or could have been tried, and said structure would not have been available for use in evidence in any event. Plaintiff specifically denies that defendant was in any way prejudiced by the failure to have notice sooner of the said accident.

Wherefore plaintiff prays as in its complaint. [12]

L. B. da PONTE,
J. W. QUICK,
Attorneys for Plaintiff.

(Verification.)

(Filed Dec. 4, 1913.) [13]

[Record of Trial—December 9, 1913.]

In the United States District Court for the Western District of Washington, Southern Division, at Tacoma, on the 9th day of December, A. D. 1913, before the Honorable EDWARD E. CUSHMAN, United States District Judge Presiding, among others, the following proceedings were had:

* * * * * * * * *

This cause coming on at this time regularly for trial, the plaintiff appearing by John B. Stevens, and its attorneys, Messrs. J. W. Quick and L. B. da Ponte, and the defendant appearing by Messrs. Holt & Harmon, a jury being called, the following named persons answered to their names and were sworn, examined and empanelled to try this case:

John Haykemp	Daniel Cowley
Charles L. Bozelle	M. C. Lowry
C. M. Wyllys	James Crowley
Robert Pattison	George Addison
Tom Brewitt	L. L. Bush
E. H. Mackey	Harry Bates

whereupon the trial regularly proceeded with the introduction of evidence oral and documentary, the following persons testifying for the plaintiff: John B. Stevens; deposition of W. H. Moore read to jury.

At the close of plaintiff's testimony, defendant moved the Court for nonsuit, which motion was denied. Whereupon, the hour of adjournment being reached the jury was admonished by the Court and permitted to separate until the next incoming court. [14]

[Record of Trial—December 10, 1913.]

In the United States District Court for the Western District of Washington, Southern Division, at Tacoma, on the 10th day of December, A. D. 1913, before the Honorable EDWARD E. CUSHMAN, United States District Judge Presiding, among others, the following proceedings were had:

* * * * * * * * *

This cause coming on at the time for further trial, the plaintiff appearing by his attorney and defendant by its attorneys, the calling of the jury being waived, it appearing that all persons were present in their proper places, the trial regularly proceeded with the introduction of evidence; the following persons testifying for defendant:

I. B. Merrill
Mrs. I. B. Merrill
Dr. W. D. Read
J. F. Fitch
Dr. James A. La Gasa
Mrs. Etta Tute
J. A. Coleman

and the following in rebuttal for plaintiff:

Mrs. Comstock
Mrs. S. P. Comstock
S. B. Comstock
James N. Bradley
L. B. da Ponte

Motion was made by plaintiff to exclude from the records and withdraw from the jury that part of the deposition of I. B. Merrill already read, which motion was denied. Whereupon, the hour of adjournment being reached the jury was admonished by the Court and permitted to separate until the next incoming court. [15]

[Record of Trial—December 11, 1913.]

In the United States District Court for the Western District of Washington, Southern Division, at Tacoma, on the 11th day of December, A. D. 1913, before the Honorable EDWARD E. CUSHMAN, United States District Judge Presiding, among others, the following proceedings were had:

* * * * * * * * *

This cause coming on at this time for further trial, the plaintiff and defendant appearing by their attorneys, and the calling of the jury being waived, it appearing that all jurors were present in their proper places, the trial regularly proceeded with the introduction of evidence, at the conclusion thereof, and after the arguments of counsel, the jury was charged by the Court and retired in the custody of a sworn bailiff for deliberation on their verdict (4:30 P. M.), both sides agreeing a sealed verdict might be returned.

And thereafter, and at 8:30 P. M., said jury returned into open court and reported that they had lost Plaintiff's Exhibit No. 5; it was stipulated by Mr. Holt and Mr. da Ponte that the copy of said exhibit in the possession of Mr. Holt might be substituted for the lost statement, said exhibit to be marked "Exhibit 5" by clerk and to become the original exhibit in the case.

And at 9:15 P. M. said jury again returning into open court, by their foreman, and in the presence of the other jurors, returned the following verdict,

which was ordered filed as the verdict in the case, and the jury ordered discharged from further consideration of the case:

> "We, the jury in the above-entitled cause, find for the plaintiff and assess its damages at the sum of Six thousand seven hundred & Seventy & Seventy dollars sixty-nine cts. ($6770.69) (Six Thousand).
>
> ED. H. MACKEY,
> Foreman." [16]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess its damages at the sum of Six Thousand seven hundred & seventy & Seventy $6770.69 dollars & Sixty-nine cts. Dollars ($Six thousand).

ED H. MACKEY,
Foreman.

(Filed Dec. 11, 1913.) [17]

Judgment.

Now on this 9th day of December, 1913, the above cause coming on for trial in the above-entitled court before the Honorable Edward E. Cushman, presiding Judge, and a jury duly empanelled therein, the plaintiff appearing by L. B. da Ponte and J. W. Quick, its attorneys, and the defendant appearing by R. S. Holt, Esq., its attorney, and the trial of said cause proceeding from day to day until the 11th day of December, 1913, when said cause was submitted to

the jury, and on said date the jury returned into court, its verdict finding the issues in favor of the plaintiff and assessing the amount of plaintiff's recovery in the sum of $6,770.69.

Now, on motion of the plaintiff, judgment is hereby entered on said verdict, and it is by the Court ORDERED, DECREED and ADJUDGED that the plaintiff have and recover of and from the defendant, Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, the sum of $6,766.88, together with the costs and disbursements of the plaintiff taxed at $136.15; said judgment to draw interest at the rate of 6% per annum from the 12th day of December, 1913; to which judgment of the Court the defendant excepts.

EDWARD E. CUSHMAN,
Judge.

(Filed Jan. 2, 1914.) [18]

Petition for New Trial.

Comes now the defendant in the above-entitled action and petitions the Court to set aside the verdict of the jury in said action and grant to it a new trial thereof, for the following causes materially affecting its substantial rights:

I.

Insufficiency of the evidence to justify the verdict.

Under this, the first specification, defendant claims that while it was admitted that the notice required by the policy was not given until several months after the accident to Merrill occurred, yet the evidence

showed that Mr. Comstock, the foreman and agent of the defendant, whose duty it was to discover and report accidents to the employees and who was depended and relied upon by the managing officers of the Company to do so, knew of the accident to Merrill more than ten days prior to the time when the notice of the accident was given to this defendant; and because it also appeared from the testimony that W. H. Moore, who was the secretary of the plaintiff and who was relied and depended upon by the officers of the company to discover and inform them of accidents to their employees and give notice thereof while acting as the secretary of the plaintiff and in a capacity which made it his duty to discover and give notice of accidents, and while acting in such a capacity that the plaintiff relied upon him to give it notice, discovered and knew of the accident to Merrill more than ten days prior to the time when notice was given by the plaintiff to the defendant, and yet the said Moore did not give notice or [19] information of the said accident for more than thirty days after he discovered the same; and because the evidence shows that while the said W. H. Moore was charged by the officers of the plaintiff with the duty of discovering and reporting to them and to the plaintiff accidents to its employees, yet he did not undertake to discharge this duty himself and did not have such relation to the work and to the men as ordinarily enabled him to know of such accidents, but he relied on Comstock, the foreman of the plaintiff, to report such accidents, and the said Comstock, with knowledge of the accident to Merrill in June

or July, did not report the same to the plaintiff; and because the evidence of the plaintiff failed to show the exercise of any diligence by it or its officers in providing any rules or regulations whereby knowledge of accidents to its employees would be required; that its managing officers did not exercise sufficient supervision over the men and the work to render it reasonably probable that they would acquire such knowledge.

II.

Errors in law occurring at the trial.

The following errors are relied on in support of the foregoing or second ground or cause for a new trial:

First: The Court erred in excluding from the jury the testimony of the witness, I. B. Merrill, with respect to certain conversations and declarations of Comstock, the foreman of plaintiff, shortly after the accident, which were offered for the purpose of showing knowledge of the accident on the part of Comstock, the testimony having been excluded by the Court because it was not shown that the declarations or admissions or statements of Comstock were made while he was acting within the scope of his power and authority as foreman or agent of [20] the plaintiff, the ruling of the Court being duly excepted to by the defendant at the time.

Second: The Court erred in excluding from the jury the testimony of the witness, Mrs. I. B. Merrill, with respect to certain conversations and declarations of Comstock, the foreman of plaintiff, shortly after the accident, which were offered for the pur-

pose of showing knowledge of the accident on the part of Comstock, the testimony having been excluded by the Court because it was not shown that the declarations or admissions or statements of Comstock were made while he was acting within the scope of his power and authority as foreman or agent of the plaintiff, the ruling of the Court being duly excepted to by the defendant at the time.

Third: The Court erred in failing and refusing to give to the jury Instruction Number III required by it.

Fourth: The Court erred in failing and refusing to give to the jury Instruction Number IV requested by it.

Fifth: The Court erred in failing and refusing to give to the jury Instruction Number V requested by it.

Sixth: The Court erred in failing and refusing to give to the jury Instruction Number VI requested by it.

Seventh: The Court erred in failing and refusing to give to the jury Instruction Number VII requested by it.

Eighth: The Court erred in failing and refusing to give to the jury Instruction Number IX requested by it.

Ninth: The Court erred in failing and refusing to give to the jury Instruction Number X requested by it.

Tenth: The Court erred in failing and refusing to give to the jury Instruction Number XI requested by it.

Eleventh: The Court erred in instructing the jury that the testimony concerning conversations and oral admissions should be accepted with great caution by the jury, to which the defendant excepted.

Twelfth: The Court also erred in calling attention in its instruction to the fact that counsel for the plaintiff had given reasons for this rule, thus giving sanction and approval to the argument on this subject by counsel for the plaintiff, to which the defendant excepted.

Thirteenth: The Court erred in instructing the jury that the plaintiff in this case would not be chargeable with any knowledge acquired by its agents, unless it was acquired while in the discharge of their duties.

Fourteenth: The Court erred in instructing the jury that under the circumstances stated by the Court in the instruction, knowledge of the accident acquired by Comstock while at Merrill's house or at the hospital, was not acquired in the discharge of his duty; this being an incorrect statement of the law; an instruction on the weight, force and effect of the evidence and an instruction not applicable to the testimony, because there was no testimony that Mr. Comstock did acquire any knowledge of the accident at either the house or the hospital, the testimony on that subject merely relating to his declarations, admissions and conduct at these places. Its bearing on knowledge already acquired by Comstock; instruction calculated to mislead and confuse the jury.

Fifteenth: The Court erred in instructing the jury that if the defendant was not damaged by the failure

to give the notice within the time fixed in the policy, the failure to give such notice would not defeat the plaintiff's action. [22]

Sixteenth: The Court erred in instructing the jury that if the defense might have been made successfully in the Merrill case, notwithstanding the alterations, that the delay would not defeat plaintiff's action.

Seventeenth: The Court erred in instructing the jury that unless the defendant would have been injured in defending the Merrill case by the failure of the plaintiff to give notice within the time fixed by the policy, this action would not be defeated by this failure. This instruction was incorrect because the question of damage by a failure to give the notice is immaterial under the issues in the case and under the policy.

Eighteenth: The Court erred in instructing the jury that the answer of the defendant alleged the accident occurred on or about the 19th day of July, when, as a matter of fact, the answer alleges that it occurred on or before the 19th day of July.

To all of which instructions and rulings the defendant excepted and its exceptions was duly allowed.

WHEREFORE, defendant alleged that by reason of the errors aforesaid the defendant was prevented

from having a fair trial and is entitled to a new trial of said action.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant.

(Filed Jan. 16, 1914.) [23]

Order Extending Time to File Bill of Exceptions.

On this, the 11th day of December, 1913, and during the trial of the above-entitled action,

IT IS HEREBY ORDERED, that the time within which the defendant may take a Bill or Bills of Exceptions to the rulings during the trial of the said cause and for reducing the same to writing and settling the same, be and the same is hereby fixed at ninety days from the date hereof, so that the said Bill of Exceptions may be reduced to writing, settled and signed at any time within said ninety days from the date hereof.

Ordered and adjudged this 11th day of December, 1913.

EDWARD E. CUSHMAN,
Judge.

(Filed Dec. 12, 1913.) [24]

Order Overruling Motion for a New Trial.

On the 26th day of January, 1914, the defendant's motion for a new trial was heard and considered, and the Court was of opinion that the same should be and it is hereby in all things overruled. To this

order the defendant excepted in open Court and its exception was allowed.

Dated the 26th day of January, 1914.

EDWARD E. CUSHMAN,
District Judge.

(Filed Jan. 26, 1914.) [25]

Assignment of Errors.

Comes now The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant in the above-entitled action, and in connection with its petition for a writ of error herein, makes the following assignment of errors on which it will rely and which it will urge on the prosecution of said writ of error in the above-entitled action, which errors occurred at the trial of said cause, to wit:

I.

That on the trial of the said cause before the District Court of the United States, for the Western District of Washington, I. B. Merrill, a witness for the defendant, testified with reference to certain conversations with Mr. Comstock, who was the foreman of the plaintiff at the time of the accident to Merrill, about his accident and his condition, as follows:

A. He was telephoned to and he comes to the house and talked to me and he said they calculated to do what was right—about paying my wages, and he came to the hospital to see me and asked me if I was going to bring suit against the company and I told him I had nothing to say and to go ahead and do something and he said he would too.

He said they had never had a suit against the company and they wouldn't like to have one brought because they were willing to do anything to get along, and I told him to go ahead and do so.

He helped pack me out of the house to the ambulance to take me to the hospital. [26]

That thereupon the Court instructed the jury to disregard the declarations and conversations with Mr. Comstock unless they found that the plaintiff sent Mr. Comstock to the hospital at the time of the conversation; and further instructed them that as there was no testimony to that effect, they would disregard these conversations only so far as they might show what he learned at the time the accident happened; and further instructed the jury that they would regard the conversations only in the event they constituted an admission on his part that he knew from the beginning that Merrill was hurt; and further directed the jury to disregard any admissions that the plaintiff would fix it up or make it good because there was nothing to show that he was on the business of the company; to all of which directions and instructions the defendant objected and excepted and its exception was allowed.

II.

That the Court erred in this, to wit:

On the examination of the witness Comstock by defendant, he testified in reference to a conversation with Merrill, the injured man, and was asked what he told Merrill, the question being objected to because it was irrelevant, immaterial, incompetent and hearsay. The objection was overruled and an exception

was allowed and the witness was permitted to testify that he did not tell him anything in particular, any more than that as he had been directed to lay off on account of his sickness he thought it was necessary to do so.

III.

That the Court erred in permitting the plaintiff, over the objection of the defendant, to prove by the witness Comstock that at the time the action of Merrill against John B. Stevens & [27] Company was commenced and notice of an intention to claim damages was given to Stevens & Company in October, Oren Busard, the chief witness to the accident, was still around town in Tacoma and was available as a witness, the testimony being offered to show that no damage was sustained by the defendant by a delay in giving notice of the accident. That the testimony was objected to because it was irrelevant and immaterial for any purpose and to any of the issues in the case, and the objection was overruled and an exception was allowed.

IV.

The Court erred in excluding from the jury the testimony of I. B. Merrill as to a conversation occurring in July over the telephone between Dr. Read and Mr. Comstock, in reference to the accident to Merrill and his condition, to which action of the Court the defendant excepted and its exception was allowed.

V.

The said Court erred in refusing to permit the witness Merrill to answer the question whether Dr.

Read said to Comstock in the conversation in August over the telephone, that Merrill would likely have to have an operation because of the injury to his kidney, and that if John B. Stevens & Company wanted a physician they could have one; to which action of the Court the defendant excepted and its exception was allowed.

VI.

The Court erred in permitting a statement to go to the jury showing the sums paid by John B. Stevens & Company in satisfaction of the judgment recovered by Merrill and the costs and interest thereon, over the objection of the defendant that there could be no recovery under the policy in this case for [28] any sum whatever; to which action of the Court the defendant excepted and its exception was allowed.

VII.

The Court erred in this, to wit: That during the trial of the said cause and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court the defendant requested the Court to give to the jury its Instruction numbered III filed by it, which instruction the Court refused to give; and defendant thereupon, and while the jury were still at the bar and before they retired to consider of their verdict, excepted to the failure and refusal of the Court to give the same and its exception was allowed. Said instruction was in the following words:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence that Mr. Moore was one of the officers of the

plaintiff and that *if* was one of his duties to obtain knowledge of accidents to employees of the plaintiff occurring while in the course of their employment at its warehouse, and if you further believe from a fair preponderance of the evidence that Mr. Moore did not exercise such a personal, reasonable direction, control and supervision over the employees as to render it likely or probable that he himself would obtain knowledge of the accidents to the employees, within a reasonable time after they occurred, and that he took no precautions to obtain such knowledge himself and did not exercise a reasonable degree of care and diligence in the supervision and management of the business as would give to him such knowledge, but that he relied and depended on some employee of the Company to give him such information, and if you believe from a fair preponderance of the evidence that this employee had knowledge [29] of the accident to Merrill, for which he recovered damages against the plaintiff, and knew that it occurred at plaintiff's warehouse while he was at work there for it, but that he did not convey such knowledge to the said Moore, or to any officers of the Company, and that by reason of such failure on his part neither Moore nor any of the officers of the plaintiff company had knowledge of the accident until long after it happened, and did not give notice of it to the defendant until more than ten days after this employee's knowledge of it and after he could have informed them of it, then and in such event you are instructed that the plaintiff cannot plead lack of knowledge of the accident as an excuse for a failure

to give notice within ten days, according to the terms of the policy."

VIII.

The Court erred in this, to wit: That during the trial of the said cause and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, the defendant requested the Court to give to the jury its Instruction numbered IV filed by it, which instruction the Court refused to give; and defendant thereupon, and while the jury were still at the bar and before they retired to consider of their verdict, excepted to the failure and refusal of the Court to give the same and its exception was allowed. Said instruction was in the following words:

"You are instructed, gentlemen of the jury, that even if you believe from a fair preponderance of the evidence in this case, that none of the officers of the plaintiff corporation knew of the accident to Merrill, yet this does not necessarily show a lack of knowledge on the part of the plaintiff, because the knowledge of some individual other than the officers of the [30] plaintiff might be knowledge of the plaintiff, you are therefore instructed, that if you believe from a fair preponderance of the evidence that Mr. Comstock, the foreman of the plaintiff, superintended and directed the men in the exercise of their work on the premises and personally supervised them while so engaged, and that the character of his duties was such that he would know when the employees in his charge met with accidents, and that he employed and discharged the men and reported

their time to the plaintiff; and if you further believe from a fair preponderance of the evidence that the officers of the plaintiff did not personally supervise the work of the men or the men while engaged in it, and did not occupy such a relation or position to the men and their work as would render it reasonably likely and probable that they would know of the accidents to the men, and if you further believe from a fair preponderance of the evidence that they established no rules or regulations requiring or directing anyone to report to them accidents to the employees while engaged at their work on the premises, and if you further believe from a fair preponderance of the evidence that none of the officers paid any attention to the question or subject of such accidents to the employees, except one, and that he assumed or was charged by virtue of his position with the duty of knowing of and ascertaining such accidents and reporting them; and if you further believe that this officer gave no directions to anyone else to report accidents to him; established no regulations or rules on the subject, and that he performed such duties and remained in such a place as that it was not reasonable, likely or probable that he would know of such accidents, and if you further believe from a fair preponderance of the evidence that this officer relied on the foreman, Mr. Comstock, to report to [31] him such accidents to employees and for this reason made no supervision and took no steps to ascertain about such accidents; and if you further believe that Mr. Comstock, the foreman, knew that Merrill met with the accident while at work for plaintiff at its

warehouse, for which he recovered damages against the plaintiff, but that for any reason he failed to inform any of the officers of the plaintiff thereof, and that by reason of his failure to give such notice and information to the said officers, they did not know of it and that they did not give notice thereof until more than thirty days after the accident and after Comstock knew of it, then and in that event you will find that the plaintiff knew of the accident when Comstock knew of it."

IX.

The Court erred in this, to wit: That during the trial of the said cause and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court the defendant requested the Court to give to the jury its Instruction numbered V filed by it, which instruction the Court refused to give; and defendant thereupon, and while the jury were still at the bar and before they retired to consider of their verdict, excepted to the failure and refusal of the Court to give the same and its exception was allowed. Said instruction was in the following words:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case, that the plaintiff did not give notice of the accident to Merrill within the time required by the policy, as explained to you in these instructions, it is not necessary that the defendant should show that it suffered any damage by reason of the failure to give the notice. The difficulty of determining what effect [32] the delay and the fail-

ure of the plaintiff to give the notice may have had on the result of the case of Merrill against Stevens, and the difficulty of showing whether the delay in the giving of the notice produced conditions which controlled or affected the decision of the jury in the case of Merrill against the plaintiff, are all presumed in law to have been provided against by the requirement of the policy making the plaintiff's right of action depend on the giving of the notice."

X.

The Court erred in this, to wit: That during the trial of the said cause and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, the defendant requested the Court to give to the jury its Instruction numbered VII filed by it, which instruction the Court refused to give; and defendant thereupon, and while the jury were still at the bar and before they retired to consider of their verdict, excepted to the failure and refusal of the Court to give the same and its exception was allowed. Said instruction was in the following words:

"You are instructed, that if the officers of the plaintiff did not exercise such a supervision over the management of the business and the control of the men and the performance of their work, as would render it reasonably likely or probable that they would know of such an accident to one of the men, and if they did not establish rules or regulations requiring or directing someone else to give them notice or knowledge of such accidents, then you are instructed, that the relation of Mr. Comstock, the fore-

man, to the management of the business and control and supervision of the men, was such that his knowledge of the accident was the knowledge of the plaintiff and that [33] likewise, in his absence, the knowledge of Mr. Bass while acting as a foreman of the men in the same manner, was the knowledge of the plaintiff, and particularly is it true that the knowledge of Mr. Comstock was the knowledge of the plaintiff if you believe from a fair preponderance of the evidence that Mr. Moore, one of the officers of the plaintiff, regarded himself as the proper person to acquire knowledge and give notice of such accidents, and if you believe that this duty was tacitly or expressly left to him by the other officers of the plaintiff and that he took no active steps with regard to the matter of acquiring knowledge of such accidents and established no rules or regulations on the subject, but depended on Mr. Comstock to give to him such knowledge."

XI.

The Court erred in this, to wit: That during the trial of the said cause and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, the defendant requested the Court to give to the jury its Instruction numbered IX filed by it, which instruction the Court refused to give; and defendant thereupon, and while the jury were still at the bar and before they retired to consider of their verdict, excepted to the failure and refusal of the Court to give the same and its exception was allowed. Said instruction was in the following words:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case that Mr. Comstock knew that Merrill had met with an accident while engaged at the warehouse of the plaintiff, in determining the question whether this knowledge is to be treated as knowledge [34] of the plaintiff, it makes no difference how this knowledge was acquired by Comstock. It is not necessary that it should have been acquired by him, in order to charge the company, while in the course of his duties for the plaintiff. If he actually know of the accident to Merrill, the question whether he acquired this knowledge while discharging any of his duties as a foreman or employee of the plaintiff is immaterial."

XII.

The Court erred in instructing the jury as follows:

"The Court permitted certain testimony concerning conversations alleged to have occurred at Merrill's house, or at the hospital, between Comstock and I. B. Merrill and between Comstock and Mrs. Merrill. This testimony was admitted for a limited purpose, as the Court explained to you at the time. And in this connection, you are instructed that the principal is charged with knowledge of all material facts of which the agent receives notice or acquires knowledge, while acting in the course of his employment and within the scope of his authority, whether the agent informs the principal of such facts or not. But you are instructed that a principal is not charged with knowledge of any fact which the agent may acquire while not acting in the course of his employ-

ment, or of information which the agent acquired while attending to business of his own."

That the defendant at the said trial and while the jury were still at the bar and before they had retired to consider of their verdict, excepted to the said instruction because it instructed the jury that knowledge acquired by the agent is not chargeable to the principal unless the agent acquired this knowledge while acting in the course of his employment, because the same was an incorrect statement of the law as applied to the [35] facts and testimony in this case; and its exception was allowed.

XIII.

That the Court erred in instructing the jury as follows:

"Therefore, you are instructed that, if you find and believe from the testimony that I. B. Merrill met with an accident on July 19th, 1909, and that at that time the foreman, Comstock, was away on his vacation and did not know of the said accident, then you are instructed that any knowledge or information Comstock may have acquired concerning the accident while visiting at Merrill's house, or at the hospital unless he was there to see Merrill in the discharge of his employment by the plaintiff, would not be the knowledge of the plaintiff in this case, because not acquired by Comstock in the discharge of his employment or in connection with matters within the scope of his authority as an agent or employee of the plaintiff, John B. Stevens & Company."

That the defendant at the said trial and while the jury were still at the bar and before they had retired

to consider of their verdict, excepted to the said instruction for the reason that it was in effect a comment upon the weight of the testimony; that it was not a correct instruction as to the law; that the instruction was calculated to mislead the jury; that it was an incorrect statement of the testimony; and thereupon the exception was allowed.

XIV.

That the Court erred in instructing the jury as follows:

"And you are further instructed in this regard that if the defendant could have learned all of the facts concerning the condition of the hopper, the manner in which it was constructed, and all the facts relating thereto, from the witnesses, [36] after notice was given, so that the change or alteration in the hopper did not prevent the defendant from learning the condition of the hopper and satisfaction establishing the same and its manner of construction at the time Merrill was injured, or the fact in connection with the alleged break of a board in the hopper, and that it was not prejudiced in its rights by reason of such alterations; then the fact that the hopper was altered, after the alleged injury to Merrill, would be immaterial and would not constitute grounds for the defendant refusing to accept and defend the suit brought by Merrill against John B. Stevens & Company."

That the defendant at the said trial and while the jury were still at the bar and before they had retired to consider of their verdict, excepted to the said instruction and its exception was allowed.

XV.

That the Court erred in instructing the jury as follows:

"The Court further instructs the jury that the failure or delay in giving notice, even though plaintiff had knowledge of the accident, would not of itself be a defense to plaintiff's suit. In order to be a defense such failure or delay in giving notice must have been prejudicial to the insurance company's rights. Therefore, if notice was not given immediately as provided, yet if the jury believe from the evidence that said suit of Merrill could have been defended by said company to as good advantage as if notice had been sooner given as required, it would be bound to accept the accident and defend the suit. In other words, if the jury believe that the witnesses to the accident and all evidence were available and that the suit could have been defended as well as if notice had been sooner given, [37] the failure to give notice sooner would not in any event be a defense, even though plaintiff knew of the accident at all times, and you will find a verdict for plaintiff."

"Another matter in issue relates to the allegation that by reason of plaintiff's delay in giving notice of the accident the witnesses were scattered. If the jury believe that such delay in giving notice was due to the want of knowledge of said accident by plaintiff and that the plaintiff was ignorant of it and without fault on its part, as before explained, it would be immaterial that the witnesses were scattered, and you cannot find for defendant on that account."

That the defendant at the said trial and while the

jury were still at the bar and before they had retired to consider of their verdict, excepted to the said instruction for the reason that it was an incorrect statement of the law; that under the law it made no difference whether the defendant had been damaged, hindered or delayed in making the defense by the failure to give notice, for the reason that the law conclusively presumes a damage, the condition being a condition precedent.

XVI.

The Court erred in giving an instruction in the following language:

"In this case there has been testimony concerning conversations and admissions, oral admissions. The Court instructs you that evidence of that kind should be accepted with great caution by the jury. Especially is that true where a considerable lapse of time has intervened between the time of these alleged admissions or conversations and the time the witness testified. One counsel has pointed out some reasons for that too. In addition to those pointed out by counsel, would be the [38] fallibility of the memory of the witness who undertakes to relate a conversation, as the meaning of persons often depends upon the arrangement of the words. The same words arranged differently often gives a different impression, or a word omitted here or substituted there may change the whole meaning of a conversation; therefore, that is why I instruct you that testimony of that kind should be accepted with caution."

That the defendant at the trial and while the jury were still at the bar and before they had retired to

consider of their verdict, excepted to the said instruction for the reason that it was an instruction commenting on the weight of the evidence; because it was incorrect as a statement of the law; for the further reason that the reference by the Court to the argument of counsel for the plaintiff was calculated to be prejudicial as giving a certain amount of sanction and approval to his argument; for the further reason that the said instruction singled out and exposed to question, suspicion and doubt the testimony of the witnesses for the defendant with reference to the declarations and admissions; and its exception was allowed.

XVII.

The Court erred in giving an instruction in the following language:

"For a further defense the defendant alleges in its Answer that I. B. Merrill received the injuries referred to on or about the 19th day of July, 1909, and that plaintiff had knowledge of said accident and injuries to said Merrill at the time but gave no notice in writing to defendant or its representatives in this locality, until the latter part of October or first of November following." [39]

That the defendant at the said trial and while the jury were still at the bar and before they had retired to consider of their verdict, excepted to the said instruction for the reason that it was an incorrect statement of the issues because the answer alleged that the accident occurred on or before the 19th day of July, 1909, and not on or about the 19th day of July, 1909; and its exception was allowed.

XVIII.

The Court erred in overruling and denying the defendant's motion for a nonsuit during the trial of the case and at the conclusion of the plaintiff's testimony, to which action of the Court an exception was allowed to the defendant.

XIX.

The Court erred in overruling and denying defendant's petition for a new trial in said action.

WHEREFORE, the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant, prays that said judgment of the District Court of the United States, for the Western District of Washington, may be reversed.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for the Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Defendant.

(Filed Mar. 5, 1914.) [40]

Petition for Writ of Error.

Comes now The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant in the above-entitled action, and shows to the Court that on or about the 2d day of January, 1914, this Court entered judgment in said action in favor of the plaintiff and against this defendant for the sum of Sixty-seven Hundred Sixty-six and 88/100 ($6,766.88) Dollars and the costs of the action, and that in the judgment and the proceedings in said

action prior thereto, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error issue in its behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for a correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals and that an order be made fixing the amount of a bond which will operate to supersede the said judgment.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant.

(Filed Mar. 5, 1914.) [41]

Order Allowing Writ of Error and Fixing Bond.

On this 5th day of March, 1914, came the defendant in the above-entitled action, The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, by its attorneys, and having filed in said action and presented to the undersigned its petition praying for the allowance of a writ of error, and having filed and presented with it an assignment of errors intended to be urged by it, praying that a transcript of the records, proceedings and papers on which the judgment in this action was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that

such other and further proceedings may be had as may appear proper in the premises,

Now, on consideration thereof, the Court does allow the writ of error upon the giving by the defendant of a bond and security to the plaintiff according to law, in the sum of Eight Thousand & no/100 Dollars, which said bond shall operate as a supersedeas bond.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Southern Division.

(Filed Mar. 5, 1914.) [42]

Order Approving Bond and Directing the Issuance of the Writ of Error.

The defendant in the above-entitled action having this day presented its bond for a writ of error to operate as a *supersedeas,* with the United States Fidelity and Guaranty Company, a corporation, as surety, and the said bond having been approved by me and filed.

It is now ordered that the writ of error issue and that all proceedings on the said judgment in the said cause be stayed pending the prosecution and hearing of the said writ of error.

Ordered and adjudged this 5th day of March, 1914.

EDWARD E. CUSHMAN,
Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

(Filed Mar. 5, 1914.) [43]

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto John B. Stevens & Company, a corporation, in the penal sum of Eight Thousand Dollars, for the payment of which well and truly to be made we hereby jointly and severally, bind ourselves and assigns firmly by these presents.

The condition of the foregoing obligation is such, that whereas the above-named principal has *used* out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, in the above-entitled action, to reverse the judgment heretofore rendered therein on the 2d day of January, 1914, and now desires to give bond and security as required by the order of the Court, to operate as a *supersedeas* and to stay the execution of the judgment in said action.

Now therefore, if the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, shall prosecute its writ to effect and if it fails to make its plea good, shall answer all damages and costs, then this obligation to be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF the parties hereto have caused their signatures to be hereunto attached this —— day of March, 1914.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY,

By E. A. STROUT & CO.,
Inc. Agents.

By E. A. STROUT, Prest.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By F. A. HILL,
Attorney in Fact.

[Seal of U. S. F. & G. Co.] [44]

Approved March 5th, 1914.

EDWARD E. CUSHMAN,
Dist. Judge.

(Filed Mar. 5, 1914.) [45]

Bill of Exceptions.

BE IT REMEMBERED, that heretofore and upon, to wit, the 9th day of December, A. D. 1913, this cause came on duly and regularly for hearing before the Hon. EDWARD E. CUSHMAN, Judge of the above-named court, and a jury.

The plaintiff being represented by its attorneys and counsel, J. W. Quick, Esq., and L. D. da Ponte, Esq., and

The defendant being represented by its attorneys and counsel, Messrs. Hudson, Holt & Harmon.

A statement of the case was made to the Court and jury on behalf of the plaintiff by Mr. Quick and on behalf of the defendant by Mr. Holt.

Whereupon the following proceedings were had and done, to wit: [46]

A copy of the complaint in the case of I. B. Merrill against John B. Stevens & Company was offered in evidence by the plaintiff and admitted and marked Exhibit 1, and is in the words and figures following, to wit:

[Plaintiff's Exhibit No. 1—Complaint.]

"Comes now the plaintiff, I. B. Merrill, and for cause of action alleges as follows:

1.

That the defendant is a corporation organized under the laws of the State of Washington.

2.

That on and prior to July 19th, 1909, plaintiff had been and was in the employ of the defendant, John B. Stevens Co., running certain machines situated in its warehouse building on the east side of the city waterway in Tacoma Harbor, Pierce County, Washington.

3.

That on or about July 19th, 1909, plaintiff was ordered by the general foreman in charge of all parts of plaintiff's plant to go and assist in unloading a car of loose grain which was to be done by means of certain hoppers and screw elevators and appliances furnished by defendant for that purpose.

4.

That while plaintiff was so engaged in said work plaintiff was ordered by said general foreman to shut off the supply of grain coming from said car. That in obeying said order plaintiff moved the lever shutting off the supply of grain from the car to the hopper, and in order to do so it was necessary for

plaintiff to reach said car and the only means provided for doing so was by stepping upon the framework of said hopper.

5.

That as plaintiff stepped upon the framework of said hopper for said purpose the same broke and gave way and plaintiff [47] was precipitated to the ground between the car and the platform, striking heavily in the fall upon plaintiff's right side and back upon certain parts of the framework of said hopper.

6.

That said framework broke and gave way by reason of being negligently and insecurely fastened and nailed, and by reason of it being inadequately constructed for the purpose for which it was used. That the manner in which plaintiff stepped upon the framework of said hopper for the purpose of shutting off the supply of grain from the car was the usual method used by the employees of defendant for said purpose and was the only way provided whereby said grain could be shut off and plaintiff was using due care.

7.

That said framework of said hopper upon which plaintiff was required to step on for said purpose, consisted of a board about one inch thick and twelve inches wide, nailed to a horizontal position on the frame of said hopper; that said board was secured to said frame by about four nails, two in either end of said board, one in either end near the lower edge of the same and one in either end near the middle of said

board and the upper part of said board was not nailed or secured in any way to said hopper frame, and as plaintiff stepped upon said frame for said purpose said board split at about the point where it was nailed near the center of its width and threw plaintiff's feet outward and toward the left, throwing plaintiff's right side and back against and across the remaining parts of said hopper frame.

8.

That said board was carelessly, negligently and insecurely fastened, and its manner of construction and fastening was well known and should have been known to said general foreman of [48] defendant, but was entirely unknown to plaintiff and was not of such nature or so apparent that plaintiff could or should have noticed its condition while engaged in his work.

9.

That by reason of the careless and negligent manner in which said framework around said hopper was constructed, and by reason of the same breaking and giving way with plaintiff as herein alleged, and by reason of the fall by plaintiff received, plaintiff sustained great and permanent injuries as follows:— Plaintiff was badly bruised and strained and rendered sick, sore and lame; and plaintiff's right kidney was bruised and maimed to such an extent that it had to be and was permanently removed; and plaintiff was thereby entirely incapacitated from performing work and labor; and plaintiff's back is weak and sore and plaintiff is advised and believes that he will never be able to perform his accustomed ordi-

nary work and labor; and that plaintiff is entirely incapacitated from performing any work and labor and will be so incapacitated for a period of one year and that after the expiration of one year plaintiff will only be able to perform the lightest and easiest kind of work; and plaintiff alleges that he is severely and permanently injured.

10.

That by reason of the injuries by plaintiff received as herein alleged plaintiff was put to great expense for medical and surgical treatment, medicines and nursing.

11.

That plaintiff is of the age of 41 years and prior to said accident was capable of earning and was earning about eighteen dollars per week ($18.00).
[49]

12.

That by reason of the premises plaintiff has been damaged in the sum of ten thousand dollars ($10,000), no part of which he has been paid except the sum of $64.00.

Wherefore plaintiff demands judgment for the sum of $9,947.00, together with his costs in this action sustained.

(Signed) FITCH & JACOBS,
Attorneys for Plaintiff.

Verified by Merrill."

A copy of the insurance policy on which this action is based was offered in evidence by the plaintiff and was admitted and marked Exhibit 2, and is in the following words and figures, to wit:

[Plaintiff's Exhibit No. 2—Insurance Policy.]

IN CONSIDERATION of the Warranties hereinafter contained and set forth on the back of this Policy, and which the Assured makes and warrants to be true by the acceptance of this Policy, excepting the statements concerning the number of employees and their compensation, which are estimated, and of the payment of Seventy-three and 00/100 Dollars ($73.00) Estimated Premium, The Frankfort Marine, Accident and Plate Glass Insurance Company, of Frankfort-on-the-Main, Germany (hereinafter called the "Company").

DOES HEREBY AGREE TO INDEMNIFY John B. Stevens Company, of Tacoma, County of Pierce, State of Washington (hereinafter [50] called the Assured), for the term of one year beginning on the 17th day of November, 1908, at noon, and ending on the 17th day of November, 1909, at noon, Standard time, at the place where this Policy has been countersigned.

AGAINST LOSS arising from legal liability for damages on account of bodily injury or death suffered by any employee or employees of the Assured resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises and in the business of the Assured as described on the back hereof; but the liability of the Company in respect to any one employee suffering injury or death shall in no case exceed the sum of Five Thousand Dollars ($5,000.00), nor, subject to this limit, shall the total liability of the com-

pany in respect to any one accident resulting in injury to, or the death of, several employees, in any event exceed the sum of Ten Thousand ($10,000) Dollars.

IT IS *EXPRESS* WARRANTED AND AGREED

2. That upon the occurrence of an accident, whether any claim *by* made in respect thereof or not, the Assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accident under Liability Insurance Policies by any special law of the State in which the policy is issued, give notice in writing of such accident to the Company, addressed to the Manager for the United States, at the office of the Company in New York, N. Y., or to the duly authorized representative for the locality in which this policy is issued. If thereafter the Assured shall receive notice of any claim arising out of an accident, duly reported to the Company as before provided, or of any legal proceedings to enforce such claim, he shall, within three days, give notice thereof to the Company in like manner, and shall forward to the Company every [51] Summons and process as soon as the same shall have been served on him.

3. That if any legal proceedings are taken to enforce a claim against the Assured, which would be covered by this policy if the Assured were legally liable in respect to such claim, the Company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the Assured, and shall have entire control of such defense, whether legal liability on the part of the

Assured in respect to the claim is proven as the result of such proceedings or not. If the Company shall at any time offer to pay to the Assured the full amount for which the Company might be liable to indemnify the Assured in respect to the claim sought to be enforced, it shall not thereafter be bound to defend any legal proceedings nor be liable for any costs or expenses which the Assured may incur in defending the same; but the Company shall not be responsible for any damage alleged to have been sustained by the Assured in consequence of any action or omission of the Company in connection with such claim or proceeding. The Assured shall, at all times, under the direction of the Company, render all reasonable and necessary assistance to enable the Company to effect settlements or to properly conduct a defense or to prosecute an appeal, or to secure information or the attendance of witnesses.

7. That the Company shall have the right at all times to examine the books of the Assured so far as they relate to the wages paid to employees; and the Assured shall, when so requested, and within ten days of the request, furnish the Company with a sworn statement of the total amount of wages paid to his employees during any period within the term of this policy which may be specified by the Company. [52]

16. That no action shall lie against the Company to recover for any loss under this policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; nor unless

such action is brought within ninety (90) days after final judgment against the Assured has been so paid and satisfied. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy, and the special agreements and warranties herein contained shall be construed as conditions precedent to the payment of any loss under this policy.

Thereupon it was stipulated by the attorneys for the plaintiff and defendant that the case of I. B. Merrill against John B. Stevens & Company, a copy of the complaint in which action has been offered and admitted in evidence, was tried in the Superior Court of Pierce County, Washington, on or about the 10th day of February, 1910, and that a verdict and judgment in favor of the plaintiff therein for the sum of $6,100.00 was rendered, together with costs amounting to $45.50. It was admitted that the case was appealed to the Supreme Court, where it was affirmed, and that on January 19, 1911, the plaintiff paid the judgment in the Supreme Court, which included the costs in both courts, amounting to $6,539.30.

Thereupon there was read in evidence the deposition of W. H. MOORE in behalf of the plaintiff, as follows:

[Deposition of W. H. Moore, for Plaintiff.]

I was in the employ of John B. Stevens & Company for seven years, ending about November 1, 1912, as chief clerk and my duties were all the duties pertaining to the office, embracing all the duties pertaining to the office of John B. Stevens & Company,

(Deposition of W. H. Moore.)

and in his absence such duties as he would perform himself.

I did not know I. B. Merrill, but I knew him as I knew all other employees. I suppose I knew there was such a man employed, [53] but not by name.

I first learned of the injury to I. B. Merrill when I received a letter from Messrs. Fitch & Jacobs, in the following language:

"Tacoma, Wash. Oct. 19, 1909.

John B. Stevens & Co., Tacoma, Wash.,

Gentlemen: We represent Mr. I. B. Merrill who was injured on or about July 19th at your feed mill and warehouse while in your employ and through your negligence. If you desire to take this matter up with us before action is brought, please do so on or before the 23d of this month.

Yours truly,

FITCH and JACOBS."

On receipt of that letter I notified W. H. Opie & Company, who was the agent of the company at the time of the issuance of the policy. I was referred to Hudson & Holt about it and at the suggestion of Mr. Holt I wrote to W. C. Ramm, Adjuster of the company, at Seattle, and above November 2, 1909, I received a letter from Mr. Ramm acknowledging receipt of report of accident and copy of complaint and stating that the matter was referred to the Home Office.

Q. I received this letter from Mr. Ramm. Letter is as follows:

(Deposition of W. H. Moore.)

"Nov. 12, 1909.

Messrs. John B. Stevens & Co.,
Tacoma, Wash.

Dear Sirs: Relative to the case of I. B. Merrill I beg to advise that I have been instructed by my home office that they deny any and all liability on account of the accident to the above-named party by reason of the fact that this accident was not reported to them within the time specified by the conditions of the policy, and they will not be liable for any judgment that may arise on account of the accident. You will therefore be advised accordingly hereby deny any and all liability on account of the Frankfort Marine, Accident & Plate Glass Insurance [54] Company on account of the accident to I. B. Merrill.

Yours very truly,

W. C. RAMM,
Adjuster."

I first learned that Merrill claimed that the accident was due to the breaking of a plank on the hopper frame at the time I received the summons and complaint, about October 30, 1909. I do not know when Merrill left work. I knew that he had left work and the reason. I was informed that he was sick. A portion of Merrill's time was allowed while he was laying off. The foreman said that Merrill was sick, broke and up against it, and that he would return every cent that we advanced him.

I did not know at that time that Merrill claimed to have met with an accident while in the plaintiff's employ. It was my duty to give notice to the in-

(Deposition of W. H. Moore.)

surance company of an accident. I knew of the necessity of such a notice and knew of the policy. [55]

At the time I received the letter from Fitch & Jacobs I made an examination of the accident and made a report to the insurance company.

FIRST EXCEPTION.

That thereupon J. W. Quick, attorney for the plaintiff asked the following question:

Q. I call your attention to the report of the accident in which the following occurred: "Did the injured person make any statement after the accident as to its cause? A. Said to H. C. Comstock that he slipped and fell in getting from platform to car and hurt his side." And the following: "I. B. Merrill stepped on frame work of cover to grain hopper. Cover intended to keep out rain while hopper was not in use and for no other purpose. Merrill acknowledged to foreman at a later date that it was his own fault and did not blame us in any way." I will ask you to state when and how you got that information.

And the following objection was made by the defendant:

"Defendant objects to this question; first, because it is leading in form; second, because it is irrelevant and immaterial to the issues of this case how, when or where Mr. Moore obtained this information; for the further reason that what is contained in the report of the accident is irrelevant and immaterial and incompetent as well; that the report has not been

(Deposition of W. H. Moore.)

introduced in evidence, proved or verified in any way, or even identified, and it is immaterial whether what was stated by counsel for the plaintiff in the question or what was read to him to the witness from the report was or was not in fact the report."

The COURT.—It is not asking him whether he made such a report, it is asking him how he got that evidence if he did make such a report, and the jury will not consider that that is his testimony **[56]** that he did make a report containing the statement made in the question. He is simply asking him how he got the information, if he did make such a report. Objection overruled. Exception allowed.

I got the information from conversation with the boys around the warehouse and from the summons and complaint after the commencement of the suit. I never had any talk with Merrill until at the court-house when the Merrill case was in grogress.

Cross-examination.

(By Mr. HOLT.)

I am unable to say just at what time I became Secretary of John B. Stevens & Company, but it was about the time of the accident, in 1909.

It was my duty to give notice of an accident because I was the only clerk in the office and I had been empowered by Mr. Stevens, as president and general manager of the company, to transact any and all business for them, but I don't think anything was said by him on the subject of giving notice of accidents to employees.

I began to investigate the accident to Merrill on

(Deposition of W. H. Moore.)

receipt of the letter from Fitch & Jacobs. I talked with Mr. Stevens about it and he approved of what I was doing. I had never read over the insurance policy prior to this time. It was in the office safe.

Thereupon the following questions were put by Mr. Holt, attorney for the defendant, and the answers set out below were made by the witness:

Q. When Mr. Ramm came down to see you at the warehouse shortly after the commencement of the action of Merrill against Stevens did you not say to Mr. Ramm in effect that the reason you did not send in the report of the accident was because the man had kept on working for a month, and that he was then laid up in the hospital and all of his bills were paid and also his lost [57] time and that you didn't think there would be any trouble on account of the accident, and that you did not see any need of reporting it? A. No, sir.

Q. Did you say to him that in substance or effect?

A. No, sir.

Q. Did he explain to you the necessity of giving notice immediately and did you not at that time say to him that you had never looked at the policy?

A. I told him I never read the policy. I would not say I never looked at it.

Q. When he told you, he did tell you, did he not, that the policy called for immediate notice within ten days. A. He did.

Q. And did you not then say to him that you did not know this? A. I did not.

I remember that Mr. Merrill went to the hospital

(Deposition of W. H. Moore.)
and that part of his wages were paid and that we commenced to pay them while he was home, before he went to the hospital. The wages were paid by me. I protested to Mr. Stevens against the further payment of the wages. I cannot tell whether this was before or after he left the hospital. His wife got the money. I informed his wife that we would no longer pay the wages at the time I had the conversation with Mr. Stevens on the subject and at the same time and place. I did not tell Mrs. Merrill why I wouldn't any longer pay the wages.

Q. Was Mr. Stevens present when you informed Mrs. Merrill that you would no longer pay the wages?

A. He was there when I protested against payment as was Mrs. Merrill, and I believe he remained in the office until I had talked with Mrs. Merrill.

I had no conversation with Mr. Stevens with reference to [58] Merrill's having been injured prior to the time of receiving the letter from Fitch & Jacobs. I had no conversation with Mr. Stevens about the accident to Merrill. I did not state, in the office of Fisher & Company, in the presence of Mr. Holt and Mr. [59] Coleman that I went to Mr. Stevens and protested against any further payment of wages to Merrill because I learned from someone else that the accident he met with while working at the hopper was not the accident which caused his illness. I did not say this in substance or effect. I did not say, in the office of Fisher & Company, on or about October 10, 1913, in the presence of Mr. Holt and Mr. Coleman, that sometime before the Merrill

(Deposition of W. H. Moore.)

suit was brought and while Merrill was in the hospital, I heard of it and I went to Mr. Stevens and protested against further payment of the wages, nor did I say in that conversation that I did not know of the condition in the policy requiring notice.

The wages of Merrill were paid weekly on Comstock's recommendation. If he had a man on the warehouse roll who was off for any cause that he deemed proper, he had the authority to pay him his wages. Comstock employed the men outside of the office employees and discharged them. He attended to the details of the handling of the products in which Stevens & Company dealt. There was machinery in the warehouse used in the baling of hay and cleaning of grain. There were about twenty-five men employed there. The warehouse was about three hundred feet by one hundred. I had nothing to do with the superintendence or the control of the men and the performance of their work, except the shipping clerk. Comstock controlled and directed the men in the performance of their work. I performed no duties outside of the office except when I was on the road. I did not observe the men at work and did not direct or see the men at work. I ordinarily remained in the office. I was not acquainted with the men personally and did not know in what particular work any man was engaged at any time. It was no part of my duty to observe the men at work or know what they were [60] doing, except so far as the question who they were and the payment of their wages.

(Deposition of W. H. Moore.)

I never told Comstock or anyone else, at any time, to report to me or to anyone else, any accident that occurred, except subsequently to the beginning of the Merrill suit, that I know of. I do not remember of having talked to Comstock at any particular time and told him to report to me any accident that may have happened. It was one of the duties that he had performed several times before and I cannot recall ever having specifically told him to tell me of accidents.

Thereupon the following question was asked by the attorney for the defendant and the answers made as set out below:

Q. Then if you didn't tell Comstock, or someone else, to report to you any accidents to the men, how did you expect to know when the men met with accidents?

A. Mr. Comstock knew at several times prior to this occurrence of accidents and reported them.

Q. I will ask the reporter to repeat the question.

A. What do you say?

A. I believe that Mr. Comstock had attended to this matter before and that he knew that we carried a policy covering accidents, and it did not occur to me that it was necessary to advise a man to perform a duty if he was already attending to it.

In the conversation with Comstock at the time he was arranging for the payment of Merrill's wages, he said nothing to me about Merrill having met with an accident. If Mr. Comstock, or someone else, did not tell me about an accident I would not know of

(Deposition of W. H. Moore.)

it. It was also the duty of Mr. Bass to inform me. He was the night foreman and Mr. Comstock was the day foreman. Comstock did not claim to have seen the accident and he did not [61] tell me when he first learned of it, nor did he tell me how it occurred. To the best of my memory and belief Comstock told me that Merrill had slipped and fallen, but he at no time connected it with the accident in which he received the injury. He did not at any time tell me that Merrill had had an accident.

It was the duty of Mr. Bass to report accidents during the time he was foreman and I depended on him to do so.

Redirect Examination.

Q. Referring to that letter of Oct. 29, Defendant's Ex. 1, in which you say that not until a few days ago did we have any idea there would be a suit. I will ask you whether you meant by that to claim any knowledge of the accident until you got the letter from Fitch & Jacobs threatening suit.

Objection because leading. Question withdrawn.

Q. State, Mr. Moore, what you meant by the quotation from the letter I have read.

A. When I found out there was a suit against John B. Stevens & Company I used *by* best endeavors to get what information I could regarding the case for The Frankfort Insurance Company, and I meant just what I said that I did not know of the case or the accident until receiving a letter from Fitch & Jacobs.

Q. Now, Mr. Holt inquired whether you had ever read the policy, and if not how you knew whether to

(Deposition of W. H. Moore.)

give notice. Please state what knowledge you had of policies of his kind with respect to the requirement of notice.

A. Just a common ordinary business knowledge.

Q. Well, I meant did you know whether notice was required? A. I did.

Q. Now, you said in answer to Mr. Holt that you told Mr. Ramm you didn't know the policy would be forfeited if you didn't give the notice. What did you mean by that?

A. I meant just what I said, that I did not know that failure to **[62]** give notice would forfeit my right to collect from the insurance company without regard to the conditions.

When I found out there was a suit against John B. Stevens & Company I used my best endeavors to get what information I could and did not know of the accident until I received a letter from Fitch & Jacobs.

In my conversation with Mr. Holt I said that I did not know that the failure to give notice would forfeit our right to collect from the insurance company without regard to the conditions.

That thereupon the following questions were asked by Mr. da Ponte, attorney for the plaintiff, and the following testimony and proceedings were had with reference thereto:

Q. Now, when Mrs. Merrill came to see about her check, or the deed, did she make any claim that Mr. Merrill had met with an accident at Stevens' warehouse?

(Deposition of W. H. Moore.)

Defendant objects to this question because it is leading in form and because it is irrelevant and immaterial and not pertinent to any of the issues in the case and mere hearsay.

Mr. HOLT.—I object, if your Honor please, because it is irrelevant and immaterial whether Mrs. Merrill said anything about the accident. It would be relevant and material, I take it, if it were attempting to connect a knowledge of the accident with Mrs. Merrill, or any of her visits, or anything of that kind, but, in the absence of anything of the kind, I think it would be immaterial. **[63]**

The COURT.—What is your contention there, Mr. Quick?

Mr. QUICK.—It goes to the fact that there was no notice given by Mr. Merrill or his wife that he had received an injury. No one up to that time had claimed that Mr. Merrill had been hurt.

Mr. HOLT.—Counsel's statement is contrary to the facts, it is contrary to what we will prove in the case.

Mr. QUICK.—Oh, no; you will not prove it; you will just try to prove it, Mr. Holt.

The COURT.—Objection overruled. Exception allowed.

A. No, sir; I had no conversation with Mrs. Merrill about the accident. Mr. Holt came up to Fisher's office, in Seattle, and asked me to talk to him and I said I did not know anything about the case. I told him what I believed, that Merrill had been injured prior to the time which he claimed, and that I had

(Deposition of W. H. Moore.)

acquired that information from Oren Busard. At the time of the notice of the accident to Mr. Opie and Mr. Ramm, Busard was in Tacoma in the employ of John B. Stevens & Company.

Recross-examination.

(By Mr. HOLT.)

We spent quite a little time and money afterwards trying to find Busard.

[Testimony of John B. Stevens, for Plaintiff.]

That thereupon the plaintiff introduced in evidence JOHN B. STEVENS, who testified as follows:

Direct Examination.

(By Mr. QUICK.)

I am president of John B. Stevens & Company. I first heard that Merrill received an accident while in our employ when the letter came from Fitch & Jacobs, this being the letter already introduced in evidence in this case, dated October 19, 1909. I had Mr. Moore answer this letter.

The last time prior to this letter I saw Merrill was on the 11th Street Bridge, just about halfway across the bridge and I stopped him because I thought it was strange for him to be going to town that time of the morning, and I inquired [64] of him and he told me, "I am sick," he says, "There is something the matter with me and I am going up to the doctor to find out," and that was all that was said at that time, any more than I said to him, "Well, go up and find out what is the matter with you. A man should not be around when he is not able to work," and I

(Testimony of John B. Stevens.)

think that is the last I saw of him. He made no statement indicating that he had been injured. I cannot remember the date I met him on the bridge. It must have been the day he left our employ. It was about the 28th day of July, 1909.

I knew we were carrying a policy in the Frankfort Insurance Company. I do not know whether I read this one, but I know that policies of that kind require immediate notice.

After receipt of the letter from Fitch & Jacobs, Mr. Moore and I consulted, but he did the work, dictating letters and all of that.

Q. Now, after the insurance company refused to defend the case what did you do in regard to defending it?

A. I got Hudson & Holt to defend it for me. We were waiting for them to give us an answer as they were the lawyers for the insurance company, and we were waiting for them to give us an answer whether they would defend. In the meantime there must have been ten or fifteen days gone by and it was so near the time to answer to the complaint, and they had all of the detail and Mr. Holt took the case and defended me and I paid him.

It is stipulated that the amount paid out by the plaintiff, attorney's fees and costs in both the lower and Supreme Court, was $761.85, and that this was a reasonable sum, which included the cost of the appeal, brief, records, transcript and everything. It was agreed that the defendant might make objections to these costs at any time later. It was stipulated

(Testimony of John B. Stevens.)

that the date for the purpose of fixing the interest should be agreed on between Mr. Holt and Mr. Quick. [65]

That thereupon the following proceedings took place:

Mr. QUICK, one of the attorneys for the plaintiff, said to the Court:

In order to expedite matters—it is not clear in my own mind at this time as to whether we should go into the question of whether the defendant was in any way prejudiced in this matter or whether that is a matter of defense. I think it is set up in the affirmative answer of the defendant and it would be more a matter of rebuttal.

Mr. HOLT.—So far as I am concerned, counsel may take his own course.

The COURT.—There is nothing before the Court at this time. The Court cannot act as advisor.

During part of July, or half of it, Comstock was away on his vacation. He left about the 15th or 16th and returned the 28th or 29th of the month of July, 1909.

I was in town in the month of July, 1909, and when I am in town I am in and out of the office and around the warehouse where they are unloading cars and down where they are double-compressing hay and around the feed mill as much or more than I am in the office. The office is in the warehouse. I was around among the men sufficient to know if one received an injury by breaking of one of the appliances.

(Testimony of John B. Stevens.)

The judgment of I. B. Merrill against John B. Stevens & Company was paid on January 19, 1911.

Cross-examination.

(By Mr. HOLT.)

I know Mr. William H. Moore. In the summer and fall of 1909 the president and secretary were the only officers of the company. I was president. I do not know whether Mr. Moore was then secretary. I will look it up and let you know. I do not know that he was secretary. When I go from the witness-stand [66] I will examine the books and inform you.

I never heard of Mr. Merrill having been hurt in my employ prior to the time when I received the letter from Fitch & Jacobs. I don't remember whether I testified in the Merrill case that I heard of the accident shortly after it occurred or about that time. Don't remember what I testified to. It didn't amount to anything.

That thereupon the following question was asked by Mr. Holt, attorney for the defendant, and the following answers [67] given:

Q. Now, I will go to the testimony, Mr. Stevens, did you not, on the trial of Merrill against you, when you were asked this question, "Did you ever talk with Mr. Merrill any about this case," and did you not say, no, you never talked to him at all about the accident? Were you not asked this question, "You do not know anything, yourself, about the actual circumstances," and did you not say, "No, it is just

(Testimony of John B. Stevens.)
hearsay with me. I was not there at the time. I heard about it." Did you swear to that?

A. Why, if that is my testimony, the answers given there would cover it. It was all looked up after the complaint was filed.

Q. I will ask you whether that was your testimony?

A. That is my testimony, of course, I suppose, if it is in the record.

That thereupon the following questions were asked by Mr. Holt, attorney for defendant, and the answers set out below were made by the witness:

Q. Mr. Stevens, was it your custom in the management of your business to take any part in the actual details of the business around the warehouse directing, superintending or controlling the men in their work in any way?

A. Well, in talking to Mr. Comstock and being around there, I was around there, I had the general supervision of the whole warehouse.

Q. Did you supervise the men yourself?

A. To some extent.

Q. To what extent?

A. Well, in telling what I wanted done.

Q. Who did you tell that to?

A. To the leading men of the warehouse, Comstock or Bass or any of those. [68]

Q. Mr. Comstock was a foreman down there?

A. Yes, sir.

Q. And Mr. Bass was a foreman?

A. Yes, sir.

Q. And you talked to them down there?

(Testimony of John B. Stevens.)

A. Yes, sir.

Q. But you, yourself, did not go around and watch the men and direct them in their working duties?

A. No, sir, I did not have my working clothes on and working with them all of the time, no, sir.

Q. You left that part of the work to Mr. Comstock and Mr. Bass? A. Yes, sir.

Q. Did you know even the names of the men in your employ?

A. Some of them, most of them I knew.

Q. Did you know them by sight when you met them?

A. Some of them I did and some of them I did not.

Q. That was a large warehouse, three hundred by one hundred feet? A. Yes, sir.

Q. And the men were scattered about in different parts of it, engaged in different kinds of work, is not that true? A. Yes, sir.

Q. And Mr. Comstock was foreman in the daytime and told them what to do and superintended them while they were doing it?

A. He and Bass together.

Q. Mr. Bass at night?

A. We were not working nights only once in a while we had a night crew on.

Q. Was Mr. Bass as much of a foreman as Mr. Comstock? A. Not as much.

Q. He took Mr. Comstock's place at times in Mr. Comstock's [69] absence? A. Yes, sir.

Q. And Mr. Bass superintended the men and directed them in their work? A. Yes, sir.

(Testimony of John B. Stevens.)

Q. Now, what did Mr. Moore do?

A. Mr. Moore was in the office and kept the books and did the correspondence and anything that came in the office line.

Q. And you did what about the business?

A. Well, I directed in all ways.

Q. Directed from the office?

A. No, not from the office altogether. When they were up against it on any account, they would come to me.

Q. Who were up against it?

A. Mr. Comstock or Moore or any of the men—lots of the other men.

Q. Mr. Comstock, Mr. Moore and Mr. Bass?

A. Yes, sir.

Q. But Mr. Bass and Mr. Comstock followed the men around and directed their work, did they?

A. Yes, sir.

Q. And you bought and sold and made contracts and directed the foreman and Mr. Moore in their conduct of the business? A. Yes, sir.

Q. Is not that true? A. Yes, sir.

Q. That is just about the exact situation?

A. Yes, sir.

Q. Now, Mr. Stevens, did you have—you heard the testimony of Mr. Moore? A. Yes, sir. [70]

Q. In which he said he was the man whose duty it was to inquire into and give notice of accident?

Mr. QUICK.—I object to that as not proper cross-examination.

The COURT.—Objection overruled.

(Testimony of John B. Stevens.)

Exception allowed.

A. Yes, sir.

Q. Was that testimony correct or not?

A. It was Mr. Moore's duty, yes, sir.

Q. He also said that you either directly or impliedly charged him with that duty? A. Yes, sir.

Q. That you gave him general authority, is that correct? A. Yes, sir.

Q. Now, did you use any rules or direct anybody to give notice to you of any accident that happened to the men?

Mr. QUICK.—I object to that as not proper cross-examination.

The COURT.—Objection overruled.

Exception allowed.

A. I do not recall of instructing anyone to notify me or Moore of an accident.

Q. Do you remember whether there was any fixed rule or any understanding between you or any of the officers or agents of your company with reference to the question of reporting accidents to the men?

A. No fixed rule that I know of.

Q. Was there any rule fixed or in effect?

A. They were all in a bunch together, the office force and myself. If there was any accident, it was unnecessary—(interrupted).

Mr. HOLT.—What was unnecessary?

A. It was unnecessary, if you want it that way, I do not think [71] I ever gave fixed instructions to report.

Q. Did you ever give any kind of instructions,

(Testimony of John B. Stevens.)

strict or loose? A. I do not recall any now.

Q. As a matter of fact, nothing was said between you or the officers of the company on the subject of reporting accidents, is not that true? A. Yes, sir.

Q. Mr. Stevens, to whom,—whom did you expect them to rely upon to report the accident happening to your men to you?

A. Either Mr. Moore, Mr. Comstock or Mr. Bass.

Q. Either Mr. Moore, Mr. Comstock or Mr. Bass?

A. Yes, any of them.

Q. And if an accident happened, you depended upon them to report it to you, didn't you?

A. Yes, sir.

Q. It was not likely with your supervision and duties about the office that you would know of accidents unless they were reported to you by someone, was it? That is true, is it not?

A. When I was there, I was around the warehouse and would know of the slightest accident.

Q. I understand, but unless accidents were reported to you by someone it was not likely that you would know of it?

A. Why, yes. Why not? If I was around there, wouldn't I know of it?

Q. You were not following the men around while they were at work? A. No, sir, that is true.

Q. Suppose a man met with an accident while at work, engaged in his duties.

A. Mr. Comstock would not be with them every minute they were there—(interrupted).

Q. No, sir—(interrupted). [72]

(Testimony of John B. Stevens.)

Mr. da PONTE.—Let the witness answer the question, please. Sit down, Mr. Holt.

(Question read.)

Q. If you were not there following the men around while they were at work, and if a man met with an accident, unless you heard of it from someone else, you would not likely know of it, would you?

A. I would have to hear of it some way to know of it, that is true.

Q. Now, you say that you depended on these three men to report to you the accident that the employees met with. You knew that you had some duty to discharge under that policy of insurance when you undertook to give notice within ten days, didn't you?

A. Yes, sir.

Mr. QUICK.—I object to that as argumentative.

The COURT.—Objection sustained.

Q. How did you undertake, Mr. Stevens—did you undertake to discharge that duty by relying on Mr. Comstock and Mr. Moore and Mr. Bass to report those accidents?

A. Yes, sir. I paid Mr. Merrill's wages for a time. I knew he was sick and finally went to the hospital. I knew that one of his kidneys was removed. I think we paid part of his wages for three weeks. I left the payment of his wages and the stopping of them to Mr. Comstock and Mr. Moore. I supposed the wages were being paid to keep him alive as he did not have any money. I was away in September and it was during my absence when the boys stopped paying his wages. I talked with Mr. Moore on the

(Testimony of John B. Stevens.)

subject of how long we would pay his wages.

I did not see Mrs. Merrill or talk to her.

I did not know Merrill was in the hospital when we were paying his wages. I did not discuss with Mr. Moore or Mr. [73] *or Mr.* Comstock what happened to bring about his sickness. I asked about his condition. He was sick when I left to go east. It looks to me likely Mr. Moore may have asked me about what we ought to pay him before I left, naturally; I was going away. Mr. Moore and I probably talked something about his being in the hospital and having his kidney removed; what was the cause; I knew that he had a kidney removed and I knew that he was sick. I do not recall talking to Mr. Moore about what happened to hurt his kidney any more than he had a diseased kidney or a lacerated kidney. I did not ascertain that it was ruptured by violence.

I do not remember that Mr. Comstock or Mr. Moore ever told me that the doctors telephoned saying that if I wanted a physician at the operation to represent me that I was at liberty to have one, but I would not swear that they did not. I do not remember any such talk.

That thereupon the plaintiff rested its case.

And thereupon Mr. Holt, attorney for the defendant, made the following motion for a nonsuit:

[Motion for a Nonsuit, etc.]

Mr. HOLT.—If the Court please, the defendant at this time desires to move the Court for a nonsuit for the reason that under the pleadings and evidence

in this case, the plaintiff has not made out its case. There is an allegation in the original complaint of the performance of all the terms and conditions of the contract, a denial, and then an affirmative allegation, and in the reply, as I remember it, to the effect that the notice was not given, because plaintiff had no knowledge of the accident. It appears from the testimony of Mr. Moore and it appears from the testimony of Mr. Stevens that Mr. Moore was one of the persons who was authorized and empowered by the defendant, and it was his duty to acquire knowledge of the accidents and to report [74] them; that Mr. Comstock and Mr. Bass were also relied upon and depended upon by Mr. Stevens for the purpose of furnishing to him that information; that the plaintiff himself established no rules, no regulations, took no steps at all, that is, Mr. Stevens took no steps at all or promulgated any rules, that is his relations were such to the men that he would not know of the accident unless they were reported to him by someone else. That the plaintiff has not sustained the burden of proof; that it has not shown that it had no knowledge of the accident; that it has not shown the exercise of any diligence on its part or any effort to discharge its duty to the defendant arising under the policy, and that the evidence shows that both Mr. Moore and Mr. Comstock had knowledge of the accident or at least had knowledge of certain facts which should have put them on inquiry, and which would have lead to a discovery of the truth more than a month prior to the time when the notice was given.

(Argument.)

(Deposition of I. B. Merrill.)

The COURT.—The motion is denied. Exception allowed.

Jury recalled.

And thereupon the defendant, to maintain the issues on its part, introduced the following evidence:

Defendant read in evidence the deposition of I. B. Merrill, the examination taking place by Mr. Holt, as attorney for the defendant:

[Deposition of I. B. Merrill, for Defendant.]

My name is I. B. Merrill. I am the same I. B. Merrill who brought suit against John B. Stevens & Company in the Superior Court of Pierce County, Washington, in 1909, for an injury received while in their employ.

Q. State briefly what you were doing and how you met with your injury.

A. Well, I was running the feed-mill for John B. Stevens on the [75] east side of the west waterway at Tacoma and Mr. Comstock was there that day and was a mill hand short there and so he was running the mill. I was working below at the mill and he fed the mill a little too heavy and choked the elevator down, and hollered down at me to shut it off from below. I did and then I had to shut it off from the car and had to cross on that hopper from the platform to car.

That board between the car and the platform broke off and let me down. It was a board on the side of the hopper; north side of the hopper. It split off, about half of it, and let me down on my short rib

(Deposition of I. B. Merrill.)

and hip bone. Part of the board remained on the hopper.

Mr. Comstock knew of my having received this injury immediately after it happened and he wanted to know if I could run the mill the rest of the day. He asked this because I was hurt. I continued to work there eight or nine days, but not all the time.

He knew I was hurt, but he did not have much to say. I did not say a great deal to Comstock.

Carlton and a man named Valebro and some others that I cannot recall were there when I got hurt.

It seems to me that Mr. Moore knew about my having met with an accident and being injured. He was not, as I know of, right at that time.

Mr. Bass was also working there. He knew of my having met with an accident. He and I talked it over. We talked about the hopper that had to be fixed over. We talked about it several days afterwards. He said they ought to have a new hopper built there. He knew that I had been injured on it and we discussed the proposed changes in it and the hopper was afterwards changed. They took it and put some two by fours along on the [76] top of it where this board had split off and had repaired it and had put the two by fours across where it fit against the car. They took off that plank on the north side and put on another. They tore it down and built a new one. I saw it had been changed, about three months after I got out of the hospital, as near as I could judge. I was in the hospital five weeks and three days. I went to the hospital along

(Deposition of I. B. Merrill.)
about the 3d of August.

Q. How long were you in the hospital?

A. Five weeks and three days.

Q. How long after your injury when you went to the hospital?

A. Why, pretty soon. They kept me at home for a week and then took me to the hospital about the 3d of August, somewhere along there, 2d or 3d—to the hospital.

SECOND EXCEPTION.

Thereupon, Mr. Holt, attorney for the defendant, asked the witness:

Q. At the time when you went to the hospital, did you have any conversation with Mr. Comstock about your accident or condition?

The question was objected to by the plaintiff.

That thereupon the objection was overruled and the witness testified as follows:

A. He was telephoned to and he comes to the house and talked to me, and he said they calculated to do what was right—about paying my wages, and he came to the hospital to see me and asked me if I was going to bring suit against the company, and I told him I had nothing to say and to go ahead and do something and he said he would too.

He said they had never had a suit against the company and they wouldn't like to have one brought because they were willing to do anything to get along, and I told him to go ahead and [77] do so.

He helped pack me out of the house to the ambulance to take me to the hospital.

(Deposition of I. B. Merrill.)

When I was discussing the accident with Bass, Mr. Comstock was away some place. He had taken Comstock's place as foreman. [78]

[Instruction Regarding Conversation at Hospital.]

That thereupon the Court said to the jury, in reference to the conversation at the hospital:

The COURT.—Now, gentlemen of the jury, regarding this conversation at the hospital, to which objection is made, the Court instructs you that it is not everything that a man who is an agent for a corporation; that everything that he happens to learn binds the corporation. It is only that knowledge that comes to him while he is acting for the corporation in the scope of his employment. There has been testimony in the case regarding what Mr. Comstock learned at the time this accident happened. Now, with regard to these conversations at the hospital, there is no testimony that the company sent Mr. Comstock to the hospital, and, there being nothing to that effect, you are to disregard that as binding the plaintiff company, the John B. Stevens Company, and only consider it to this extent: That is, as to enabling you to determine what he learned—he, Comstock, learned—when this accident happened. If those conversations are in effect an admission on his part that he did know from the beginning that this man was hurt in the mill, you will consider it to that extent, but, so far as the company is concerned, you will disregard any admissions he made that the company was going to fix it up, or going to make it good, or all right, and all that. You will disregard that,

because there was nothing to show that he was on the business of the company.

To which the defendant objected and excepted and his exception was allowed.

A day or two after my injury I discussed the hopper with Mr. Comstock. He said it ought to have been fixed a long time ago. He may not have understood exactly what happened, but we had talked about it several times before and he knew that I claimed that a board had broken off as I had so told him. I had told him that the board had split off and he said it ought [79] to have been fixed long ago. I never had any talk with Mr. Stevens, and Mr. Comstock told me that he had taken and knocked off the piece of the board that was left on the hopper and taken the bottom board of the hopper and put it on the top.

I never had any conversation with Mr. Stevens on the bridge about my condition and illness or anything on that subject. I never had any conversation with Mr. Stevens that I remember of.

Cross-examination.

(By Mr. QUICK.)

A. I was hurt the 18th or 19th day of July; I am not sure which it was. Either the 18th or 19th of July, I believe.

Q. Well, do you know? A. Yes, sir.

Q. Are you positive then?

A. Yes, sir. I was back at the warehouse the next morning after I quit. I was there for a few minutes. I didn't work that day.

(Deposition of I. B. Merrill.)

Q. Then where did you go?

A. I was up to the doctors. I went back to town on the 11th St. bridge. There was no other way to go.

[Testimony of John B. Stevens, for Defendant (Recalled).]

At the request of counsel for the defendant, JOHN B. STEVENS was recalled for further examination by Mr. Holt, attorney for the defendant:

Cross-examination.

(By Mr. HOLT.)

I find that Mr. Moore was elected secretary of John B. Stevens & Company on the first day of August, 1908, and that he was secretary at the time of the accident to Merrill. He is still our foreman and is in the courtroom.

Mr. Bass is dead.

If any of the men working for John B. Stevens were injured or got sick, the man who happened to be there, Mr. Moore, Mr. [80] Comstock or myself or Bass, or anyone, looked after them. Mr. Comstock hired and managed the men and discharged them.

When Mr. Comstock was acting as foreman, the man who was with the man when he was injured would go to the office and report the injury. There was no one designated for that purpose. There was no man whose duty it was to look after a man under [81] such circumstances, unless it was Mr. Comstock. It would naturally be the foreman in charge, if he was there.

(Testimony of John B. Stevens.)

I did not know that Comstock had gone to the hospital with Merrill. If Comstock went to the house of Merrill and took him to the hospital or made any statement with reference to the payment of the wages, he was acting on his own account and I knew nothing of his having done it, but I knew that the wages were being paid on his recommendation; but Comstock was going beyond the range and scope of his authority when he undertook to assist the man or go to the hospital with him.

(By Mr. HOLT.)

Q. Do you remember I also said to you "You must communicate with Mr. Ramm at Seattle. I have nothing to do with the matter, although I represent the company in its ordinary litigation, but I will write to Mr. Ramm for you and call his attention to the accident"? You remember that, don't you?

A. I do not remember it; no, sir.

Q. You won't say it did not occur?

A. I won't.

Q. And didn't this also occur: In that conversation didn't you say to me that the accident occurred some time in July; that you did not regard it as of any importance and gave no notice; that the man strained himself and subsequently went home sick; that you had paid his wages; that he went to the hospital and you had paid his wages there, and he afterwards came back and went to work, and that you did not consider it a matter of any importance and hence failed to give any notice? A. No, sir.

[Testimony of Mrs. I. B. Merrill, for Defendant.]

That thereupon Mrs. I. B. MERRILL was sworn and testified in behalf of the defendant as follows, being examined by Mr. Holt: [82]

Direct Examination.

I am the wife of I. B. Merrill and was his wife at the time he met with the accident in the employ of John B. Stevens & Company. I remember when he met with the accident. I learned of it on the 18th of July, in the evening. I remember his going to the hospital. He went on the 2d or 3d of August. Mr. Comstock was at our house about Aug. 2d. I had a conversation with him that afternoon when Mr. Merrill was at the hospital.

Mr. da PONTE.—If the Court please I want to object to any testimony with reference to anything that occurred at the house or hospital, because it appears that Mr. Comstock went there on his own motion, and Mr. Stevens was examined by the defendant and that fact was proven. Now, if the Court please, they cannot bind the plaintiff by anything that Mr. Comstock may have learned when going around on his own business, attending to his own affairs.

The COURT.—There is nothing before the Court now.

Mr. Comstock talked about Mr. Merrill's having been injured.

Mr. HOLT.—Q. State what Mr. Comstock said to you on that subject on that occasion.

(Testimony of Mrs. I. B. Merrill.)

Mr. QUICK.—I object to that as incompetent and hearsay.

The COURT.—Objection overruled.

Mr. Comstock was at my house and I had a conversation with him after Mr. Merrill was in the hospital that afternoon. Mr. Comstock helped to carry him out to the ambulance. Mr. Comstock talked to me then about Mr. Merrill's having been injured. He said it was too bad that Merrill got hurt; that Mr. Stevens would stand good for his hospital bill and pay his wages. I went down to get his wages after Comstock told me to come. They [83] were partly paid. I went down one day and Mr. Comstock sent me to Mr. Moore and he said that Mr. Stevens had ordered him not to pay me any more; that he had got back from the east and that he ordered him not to pay us any more. It was about three weeks after Mr. Merrill went to the hospital. I had no conversation with Mr. Stevens about these matters at any time.

Cross-examination.

(By Mr. QUICK.)

Q. You say Mr. Merrill was hurt on what day?

A. It was the 18th or 19th. I would not be sure. It was one of those dates.

Q. The 18th or 19th of what month?

A. July.

Q. 1909? A. Yes, sir.

While he was in the hospital I went to John B. Stevens' offices and they paid me some of his wages. They never paid a full week's wages at any time,

(Testimony of Mrs. I. B. Merrill.)

and that is all they gave me.

Merrill was hurt on the 18th or 19th day of July; I am not sure. It was one of those days.

Thereupon the defendant read in evidence the deposition of W. C. Ramm, as follows:

[Deposition of W. C. Ramm, for Defendant.]

(By Mr. HOLT.)

I live in San Francisco. I will not be in the State of Washington during the month of December, 1913. I am claims adjuster of the Globe Indemnity Company. I was in Seattle, Washington, as claims adjuster for the Frankfort Marine, Accident & Plate Glass Insurance Company, in the summer and fall of 1909.

I heard about the claim made by Merrill against Stevens & Company about October 28th or 29th, 1909, through communication from Attorneys Hudson & Holt, and a letter from John B. Stevens [84] & Company dated October 29, 1909, in the following language:

"Tacoma, Washington, October 29, 1909.

Mr. W. C. Ramm,

Adjuster Frankfort Insurance Company Seattle, Washington.

Dear Sir: At the present time we are carrying an employers' liability policy with your company written by W. H. Opie & Company, Tacoma. In July this year one I. B. Merrill was hurt while stepping from the platform to a car on our side track, and not until a few days ago did we have any idea that there would be a suit in consequence. However, we have

(Deposition of W. C. Ramm.)

a copy of the summons and as your attorneys here seem to be waiting for instructions from you before starting the defense we feel that the matter demands prompt attention. We do not think that said party has [85] any standing whatever in court and will be glad to have our foreman take the matter to your attorney's attention in particular. Please advise disposition of summons early.

Very truly yours,

JOHN B. STEVENS & COMPANY."

After I went over to Tacoma to investigate this accident I had a conversation with W. H. Moore, at the office of John B. Stevens & Company. I was referred to Mr. Moore as the man in charge of the office. He was secretary and manager of John B. Stevens & Company. He said that he had written the letter which was signed Stevens & Company, which I have set out.

Q. State what conversation you had on the morning of October 30, 1909, with Mr. Moore.

A. When I called at the office of the John B. Stevens Company and asked for the manager or man in charge, I was referred to Mr. Moore. After introducing myself, I advised him that I was there to look into the case of this injured man Merrill, as to how the accident occurred, and various facts in connection with the case. After a short discussion about the way the accident occurred, I asked him why he had not reported the case before that time. He stated that after working at the plant, for a time after he was injured, he went to the hospital and

(Deposition of W. C. Ramm.)

later returned to their employ and he thought that nothing would come of the case, and therefore did not report it. I then asked him if he did not know that the policy required that all cases of accidents occurring under the policy of the Frankfort Marine, Accident & Plate Glass Insurance Company had to be reported within ten days. He said he did not know that. I asked him if he had ever read his policy, and he said he had not. I then advised him that owing to the—

Q. You mean by "advised," you told him?

A. Then I told him that owing to the fact that the accident had [86] not been reported to us within the time limit called for in the policy that I could not assume the case and would have to refer it to our head office in San Francisco for their instructions.

Q. Did Mr. Moore in that conversation tell you about when the accident had occurred?

A. He said that the accident had occurred in July, 1909. He told me that when I was discussing the case with him, trying to learn of the facts.

Q. Do I understand you, Mr. Ramm, that Mr. Moore explained to you why a report of the accident had not been made earlier?

A. He stated that the man had—

Q. Just answer that.

(Question read.)

A. Yes, sir.

Q. Just what did he say in that regard?

A. He said that the man had been injured, and

(Deposition of W. C. Ramm.)
having remained in their employ for a short time after being confined in the hospital, where his wages and doctor bills had been paid, that he returned to their employ, and did not think anything of the case or that he would ever hear anything of it; so, he did not report it.

I received a report of accident from John B. Stevens & Company. I told Mr. Moore that I could not take up the question with my company unless they made out a report of accident. I received it on October 31st or November 1st. It was one of our regular blanks and reads as follows:

"Report of Accident. Name of Employer, John B. Stevens & Company; address of employer, West Waterway, Tacoma, Washington; business, Hay, Grain and Flour; injured person's name, I. B. Merrill; age forty-one; daily wages two dollars and a half; occupation, laborer; married; address, 1524 South D Street, City of Tacoma, Washington; in whose service, John [87] B. Stevens & Company; general duties, sack sewer working in feed-mill; how long employed prior to the accident, about fourteen months; how long engaged on this job, about fourteen months; had he done similar work prior to this employment, yes; was the injured person familiar or not with the work engaged in or the machinery being operated at the time of accident, had been employed in different feed-mills and flour-mills in Tacoma and Seattle; was he in full charge of the machine to the extent that he could start and stop it at will, yes; describe machinery, tool, staging, etc.,

(Deposition of W. C. Ramm.)

connected with the accident, framework cover to grain hopper; was it sound and in good working order at time of accident, and who can prove this, yes, H. C. Comstock; state who was responsible for seeing machinery in good order when last inspected by him, and result of inspection, no machinery involved in this case; nature and extent of injury, he avers he fell while stepping to car; probable period of disablement, not known, kidney rupture; was injured person engaged in his regular occupation at time of accident, yes; what instructions as to his duties had he received and who gave same, no special instructions given; was he obeying his instructions when injured, yes; taken to home or hospital, if to hospital state name and location, injury not supposed serious at time; still in hospital or discharged, discharged; has the person returned to work, no; did the injured employee ever give notice of any defect in ways, works or apparatus connected with the accident; and if so was such defect remedied, nothing reported; did the injured person know of the defect, and if so who can prove this, no defect known; did the injured person make any statement after the accident as to its cause, or admitting his own carelessness, and if so what did he say, and who heard it, said to H. C. Comstock that he slipped and fell in [88] getting from platform to car and hurt his side; was doctor or surgeon called, or did injured person go to him, he went to a doctor three or four weeks later; name and address of surgeon, if any, who attended him, Dr. Wilmot B. Reed, Fidelity

(Deposition of W. C. Ramm.)
building; date of accident June 14th or 15th, 1909; place, J. B. Stevens' warehouse, Tacoma Washington; name and address of foreman in charge, H. C. Comstock, 3708 South A; has he power to engage and discharge workmen, yes; where was foreman at time of accident and what was he doing, in warehouse at time attending to duties; names and addresses of all persons who witnessed the accident, or who claim to have witnessed it, or who would probably know anything about it. Place the mark X against the names of those, if any, who were not your employees at the time of the accident, Oren Busard, Sherman House, D Street, witnessed accident; have any of the above been discharged or left your employ since? If so, give names and state whether discharged or left voluntarily, none discharged; has any other accident ever occurred to any of your employees under similar circumstances, at the same place or with the same apparatus, no; was accident due to want of ordinary care on the part of injured person, or to negligence of any other person; if so, of whom, lack of ordinary care on part of injured person; narrate below how the accident happened, its causes, etc., and illustrate by any marked rough sketch which you think will enable the cause of the accident to be easily understood, I. B. Merrill stepped on framework of cover to grain hopper. Cover intended to keep out rain while hopper was not in use and for no other purpose. Merrill acknowledged to foreman at a later date that it was his own fault and did not blame us in any way; how many days a week does

(Deposition of W. C. Ramm.)

injured party work, six and sometimes seven."

This report was sent to me by letter from John B. [89] Stevens & Company and this letter was in the following language: "Tacoma, Wash., October 30, 1909, W. C. Ramm, Hoge Building, Seattle, Washington. Herewith report of accident and copy of summons in the case, as per your request. Summons was served Saturday, October 30, 1909, and is returnable in twenty days. Please let us hear from you at earliest date possible. Very truly yours, John B. Stevens & Company," with the initial "M" below.

John B. Stevens & Company also sent me a copy of the original report made by Dr. Read. I have hunted for it and cannot find the original. I received it about November.

When I talked to Moore he said to me that the reason he did not send in a report was because the man had kept on working for a month and that he was then laid up in the hospital and all his bills were paid and that he did not think there would be any trouble on account of the accident and he did not see any need of reporting it. I explained to him the necessity of giving notice immediately and within ten days. He said he did not know of this.

I took up all matters connected with the matter with W. H. Moore. My company refused to defend the suit because notice had not been given.

[Testimony of Wilmot D. Read, for Defendant.]

Thereupon the defendant introduced WILMOT D. READ, who testified as follows:

Direct Examination.

(By Mr. HOLT.)

My name is Wilmot D. Read. I operated on I. B. Merrill for an injury to his kidney in the latter part of July or first of August. He had a ruptured kidney such as usually comes from a fall or blow.

Cross-examination.

(By Mr. QUICK.) [90]

He was very weak and wanted to find out what was the matter. He came into the office and complained of weakness. I examined his urine and found it filled with blood. I asked him how long that existed, if he hadn't noticed it, and then he gave me a pretty definite answer, and then I went into the history of the case. It was then I learned that he had had a fall and struck on his side and that he had continued working in this condition for some time. I sent him home and afterwards removed the kidney.

He did not complain of the injury until after I quizzed him. Complained of tenderness over his kidney.

When Merrill came to my office he did not complain of having been injured. He came to me to find out what was the matter with him. There are things that made an impression on me that I do remember. He was very weak and was all in and he wanted to

(Testimony of Wilmot D. Read.)

find out what was the matter with him.

Q. Isn't it true as you remember it that he did not connect up his condition with any fall or injury that he had received until after you had quizzed him for quite a long time and drawn it out of him?

A. Mr. Merrill came into the office and complained of weakness—all in—and I examined his urine and found it filled with blood. I asked him how long that had existed, if he hadn't noticed it, and then he gave me a pretty definite answer, and then I went into the history of the case and examined him and looked him over, and then I learned that sometime previous to that, I could not say, he had had a fall and struck upon his side and that he had continued working in this condition, for how long I do not remember, but those are the things that impressed me, and the things that I remember relative to it.

Q. I found those things from his history and examination of his urine before I got any information from him that he had met with [91] an injury.

Q. Mr. Merrill did not attribute his condition to any injury he had received?

A. As I remember that was brought out in the history. I do not remember having any talk with Mr. Stevens or any member of the company in regard to it.

Redirect Examination.

(By Mr. HOLT.)

After I had examined him I asked him if he had received an injury and then I told him it came from the kidney.

[Testimony of James A. La Gasa, for Defendant.]

Thereupon JAMES A. LA GASA, a witness, was offered in behalf of the defendant, and testified as follows:

Direct Examination.

(By Mr. HOLT.)

I am a physician. I assisted in the operation on I. B. Merrill. He entered the hospital on August 4, 1909, and left August 31, 1909.

[Testimony of Mrs. Etta Tute, for Defendant.]

Thereupon the defendant introduced Mrs. ETTA TUTE, a witness, who testified as follows:

Direct Examination.

(By Mr. HOLT.)

Q. State to the jury Mrs. Tute what it was he (Comstock) said to you on that subject?

Mr. da PONTE.—That is objected to as irrelevant, immaterial and incompetent.

The COURT.—Under what rule do you claim it is admissible, Mr. Holt?

Mr. HOLT.—It is a declaration of Mr. Comstock showing that he knew at that time.

Objection overruled.

I live in Tacoma. I knew Mr. Merrill and his wife. Mr. Merrill was in the hospital in 1909. I was living near them. I [92] knew Mr. Comstock from having been introduced to him the day Mr. Merrill was taken to the hospital. He was present. I said to Mr. Comstock, "I feel sorry for Mrs. Merrill because they have been in such poor

(Testimony of Mrs. Etta Tute.)

circumstances," and he said to me, "You [93] tell Mrs. Merrill not to worry, that Mr. Merrill's wages will continue the same as though he was working," and that he had just as much right to his wages as some others that had been in the factory, that got their wages all the time. That Mr. Merrill had the same right, and he said that he would see that he did.

[Testimony of John A. Coleman, for Defendant.]

Thereupon the defendant introduced JOHN A. COLEMAN, a witness in behalf of the defendant who testified as follows:

Direct Examination.

(By Mr. HOLT.)

My name is J. A. Coleman. I am an attorney and I represent the claim department of the Frankfort Marine, Accident & Plate Glass Insurance Company in the State of Washington.

I know Mr. W. H. Moore. I had a conversation with him in the office of Fisher Flouring Mill Company on or about October 10th last. Mr. Moore stated in my presence that he was told, before the suit was brought against John B. Stevens & Company and while Merrill was in the hospital, something about Merrill having met with some other accident that accounted for his injury at that time and when he heard of it he went to Mr. Stevens and protested against the payment of further wages to Merrill on account of that fact. He said this practically. He said that he claimed to Mr. Ramm that he did not know of the accident until ten days after it had oc-

(Testimony of John A. Coleman.)

curred, but that he did not say to him that he did not know an accident had happened until the time suit was brought.

Q. (By Mr. HOLT.) In that conversation, did he say, Mr. Coleman, that he did not tell Mr. Ramm that he did not know of the condition in the policy requiring notice, but that what he did say was that he did not know that the policy would be forfeited if he did not give the notice. **[94]**

A. Practically that, yes. He did not say it in those words, and he did not say it all in one sentence.

Cross-examination.

(By Mr. QUICK.)

Mr. Holt was with me at the time. We went over for the purpose of digging into the matter and seeing what we could learn from Mr. Moore.

I have answered the questions that have been asked me and I have not been asked anything else.

Mr. Moore did tell me that after they had received notice of this claim they went to investigate the matter.

I do not think I ever read the first answer Mr. Holt filed in this case. I know that in the first answer it was alleged that the accident occurred on June 15th or 16th, instead of July, and I know now that the case was defended on the theory that the injury occurred in June, 1909.

Recross-examination.

(By Mr. QUICK.)

The only thing I learned about the question of dates was through conference with Mr. Holt was

(Testimony of John A. Coleman.)

that the foreman, Mr. Comstock, had testified in the case of Merrill against John B. Stevens & Company that he knew nothing of the accident unless it happened in June.

I learned that it was the whole theory of the case that Mr. Merrill was not injured by the breaking of a board at the hopper, and that it was claimed by John B. Stevens & Company that they did not know anything about it, if a board did break.

Redirect Examination.

(By Mr. HOLT.)

I know nothing about the trial of the other case. What I learned of the other case was that Comstock took the position; that the accident occurred in June.

[95]

[Testimony of J. F. Fitch, for Defendant.]

Thereupon J. F. FITCH was sworn and testified in behalf of the defendant as follows:

Direct Examination.

(By Mr. HOLT.)

I was one of the attorneys in the case of I. B. Merrill against John B. Stevens & Company.

Rebuttal.

That thereupon the plaintiff offered and read in evidence certain parts of the deposition of W. H. Moore, and the following proceedings were had with reference thereto:

[Excerpts from Deposition of W. H. Moore, for Plaintiff, in Rebuttal.]

Mr. QUICK.—I now offer in evidence the part of the deposition of Mr. W. H. Moore which was excluded yesterday in relation to the matter of making a report to Mr. Ramm. The report is now in evidence as a part of Mr. Ramm's deposition, which makes this part of the deposition competent. (Reading.) "Q. Now, Mr. Moore, at the time you got this notice from Fitch & Jacobs and received the Complaint, did you make any inquiry concerning the matter? A. I did. Q. Did you, or not, then make a report of the accident to the insurance company at Mr. Ramm's request? A. I did. Q. I call your attention to the report of the accident in which the following occurred: 'Did the injured person make any statement after the accident as to its cause? A. Said to H. C. Comstock that he slipped and fell in getting from platform to car and hurt his side.' " And the following: "I. B. Merrill stepped on framework of cover to grain-hopper. Cover intended to keep out rain while hopper was not in use and for no other purpose. Merrill acknowledged to foreman at a later date that it was his own fault and did not blame us in any way." I will ask you to state when and how you got that information.

Mr. HOLT.—"Defendant objects to this question, first, because it is leading in form; second, because it is irrelevant and **[96]** immaterial to the issues of this case how, when or where Mr. Moore obtained

(Deposition of W. H. Moore.)

this information; for the further reason that what is contained in the report of the accident is irrelevant and immaterial and incompetent as well; that the report has not been introduced in evidence, proved or verified in any way, or even identified, and it is immaterial whether what was stated by counsel for the plaintiff in the question or what was read by him to the witness from the report was or was not in fact the report."

The COURT.—Objection overruled. Exception allowed.

Mr. QUICK.—(Reading:) "A. Why, I got the information from conversation with the boys around the warehouse, from the Summons and Complaint.

Q. When?

A. When I received the blank from Mr. Ramm.

Q. That was after the commencement of the suit?

A. It was."

[Testimony of Mrs. H. C. Comstock, for Plaintiff (in Rebuttal).]

Thereupon Mrs. H. C. COMSTOCK was sworn and testified in behalf of the plaintiff as follows:

Direct Examination.

(By Mr. QUICK.)

I am the wife of Mr. Comstock, foreman of John B. Stevens & Company. On the 19th day of July, 1909, Mr. Comstock was with me at Seattle. It was Tacoma Day at the Fair. I was with him. We left on the nine o'clock boat Tacoma Day and stayed all day at the fair and went to Everett in the evening

(Testimony of Mrs. H. C. Comstock.)

and we stayed at Everett until Tuesday, and we came back and went to Mineral and Mr. Comstock had his two weeks' vacation and we stayed the rest of the time at Mineral. He was away two weeks. We went to Seattle Tacoma Day. I know it was in July.

Cross-examination.

(By Mr. HOLT.)

I do not know whether it was the 18th or 19th of July, [97] but I know it was Tacoma Day. Mr. Comstock and his mother and I went over to Seattle on the morning boat. He was gone two weeks on his vacation. I do not know anything about his helping to carry Merrill to the hospital. He never talked to me about what was going on in the warehouse. He told me yesterday that he might call me for a witness. I did not go into details. I went to ask him questions and he said, "That is all right; that is all I want to know, if you remember that we went to Seattle on Tacoma Day."

[Testimony of Mrs. S. P. Comstock, for Plaintiff (in Rebuttal).]

Thereupon Mrs. S. P. COMSTOCK was sworn and testified in behalf of the plaintiff as follows:

Direct Examination.

(By Mr. QUICK.)

I am the mother of H. C. Comstock. On Tacoma Day in July, 1909, Mr. Comstock and his wife and I went to Seattle to the Fair. We were gone about a week, I think, or something like that. After we left Seattle we went to Everett on a visit and stayed sev-

(Testimony of Mrs. S. P. Comstock.)

eral days. I do not know how many days we were there.

[Testimony of H. C. Comstock, for Plaintiff (in Rebuttal).]

Thereupon H. C. COMSTOCK was sworn and testified in behalf of the plaintiff as follows:

Direct Examination.

(By Mr. da PONTE.)

My name is H. C. Comstock. I was foreman for John B. Stevens & Company for ten years. I remember Mr. Merrill.

On July 16, 1909, I went over to Seattle in the morning, I remember distinctly. It was Tacoma Day. Stayed there until evening. Went to Everett and was gone about a little less than two weeks, from the 16th day of July. I layed off for my vacation on July 14th and returned on the 28th.

The first I ever knew of an accident on the 18th or 19th [98] of July was when we got the complaint in this suit, about the 9th day of October, 1909. I first heard that Merrill claimed that a plank on the hopper had broken and caused him to fall when I read it in the complaint.

I did not see I. B. Merrill from the time I left on my vacation until I returned, about the 28th day of July, when I met him in the morning. I had heard of him that morning through Dr. Read, who called me on the 'phone.

That thereupon the witness was asked by the attorney for the plaintiff the following question:

Q. Did Dr. Read tell you that Merrill had been in

(Testimony of H. C. Comstock.)
an accident at the mill?

To which question the defendant, by his attorney, made the following objection:

Mr. HOLT.—I desire to object to that as being leading, irrelevant, hearsay and incompetent.

That thereupon the objection was overruled and an exception was allowed, and the witness answered:

A. No, sir, I did not.

I saw Merrill after the conversation with Dr. Read. I said to him, "What are you doing down here this morning, Merrill"? "Dr. Read called me up last night and told me you were sick and that it was necessary for you to lay off a few days." He said, "He did tell me that, but I thought I had better come down and see you."

It seemed to me that Merrill's purpose in coming was in regard to being hard up; that he couldn't afford to lay off and so on. If he was sick I didn't want him to work. I do not want any man to work when he was sick.

I did not have any conversation with him in respect to paying for his time and I did not remember his saying anything about it. [99]

That thereupon the witness was asked by the attorney for the plaintiff:

Q. What did you tell him?

And thereupon the question was objected to by the attorney for the defendant as follows:

Mr. HOLT.—Wait a minute. I object to that as irrelevant and immaterial, incompetent and hearsay.

On which the Court made the following ruling:

(Testimony of H. C. Comstock.)

The COURT.—Objection overruled. The jury will only consider it on this question of whether this witness then knew or theretofore knew or then learned that this man had been hurt at the mill. Other than that you will disregard the conversation. Exception allowed.

That thereupon the witness answered:

A. I do not remember that I told him anything in particular any more than I thought as long as he had been advised by the doctor to lay off on account of his sickness I thought it was necessary for him to do so.

That is all that was said.

He went home. As far as I know he left the warehouse. This was about eight or nine o'clock in the morning.

I called on him a few days later to see how he was getting along.

Neither Mr. Stevens nor anyone else told me to go. I went of my own accord and not in connection with the business of John B. Stevens & Company. I went to his house and saw him. I had a talk with him. I had a conversation with him. I could not repeat the conversation exactly. There was not much of anything said, only I asked him how he was feeling and how he was getting along and so on. We talked a few minutes like that. I did not hear of an accident at that time, nor [100] did he attribute his condition to an accident, nor was anything then said about his wages. He was hard up and he had given me to understand that he was and I spoke to Mr. Stevens about it and asked him what he wanted to do in re-

(Testimony of H. C. Comstock.)

gard to paying something to Merrill while he was off, and he said to do what I thought was right. I did not promise him on behalf of John B. Stevens & Company to pay his doctors' bills. I did not have any talk with him about the doctors' bills. I may have said the same thing to Mr. Moore about paying his wages what I said to Mr. Stevens.

The next time I went to his house was when he was taken to the hospital. I saw Mrs. Tute there. I did not leave any message with Mrs. Tute to deliver to Mrs. Merrill, nor did I tell her to tell Mrs. Merrill not to worry, that the company would pay Mr. Merrill's wages the same as others that got hurt. I said nothing like that. I did not know that I spoke to Mrs. Tute. I did not know her at the time. I had no authority to represent Mr. Stevens in the matter of promising to pay Merrill's doctor bills or time or anything else. Mr. Stevens' men have always been taken care of when they were sick or incapacitated. I did not treat Merrill any different than I have treated others under the same circumstances.

I had no talk with Mrs. Merrill at the time Merrill was taken to the hospital. I may have spoke a passing word to her, but no conversation that I remember of.

Neither Mr. or Mrs. Merrill, at any time, claimed to me that Merrill met with an accident in Mr. Stevens' employ and that he was sick on account of it, nor did I ever tell Mr. Stevens or Mr. Moore that Merrill sustained an accident at the warehouse.

I went to the hospital to see Merrill. I did not ask

(Testimony of H. C. Comstock.)

[101] him to not bring any suit against John B. Stevens & Company about the accident. Had no talk with him about a suit. I did not know he was going to bring suit.

I read the summons and complaint in Merrill's case and talked to Mr. Moore about it and we began to look it up to see if there had been any accident. I had never heard of an accident up to that time.

I examined the hopper. The hopper had been altered at the time the summons and complaint was served. It was simply a change in the cover on the hopper. The hopper was built first for a certain car. We found afterwards that it did not work except on one certain sized car and we decided to make the change. I had figured on that a long time before and had engaged the millwright to do the work on it, but they were busy at that time and I could not get them when I wanted them. They came as soon as they finished the job they were working on.

I think the changes were made before the summons and complaint were served.

When I read the summons and complaint I went to see if I could find any broken planks that had been taken from the hopper, but there were no broken ones. I found the very plank and post that Merrill claimed were broken. I took them into the office and put them behind the safe and they were burned up in the fire about November 30th. The fire burned up everything. I recovered and preserved those planks shortly after the summons and complaint came into the hands of the company.

(Testimony of H. C. Comstock.)

At the time the summons and complaint were served none of the men had left our employ who were there in July, 1909, that summer, except probably one or two of them, who were working in town. The following were still there: Frank King, O. J. Jenks, C. D. Jenks, George Carlton, Jas. H. McCrary, John Martin, [102] William Martin, J. K. Hall, John Velebir and George Brady.

These men all testified on the trial of the Merrill case in the Superior Court.

That thereupon the attorney for the plaintiff asked the following question:

Q. Now, calling your attention to one Oren Busard, was he still around town at the time this notice was received from Fitch & Jacobs and notice given to the insurance company?

That thereupon the attorney for the defendant made the following objection:

Mr. HOLT.—Wait a moment. If your Honor please, I did not interpose an objection prior to this time to this testimony, but I presume that the intent and purpose of it is perfectly plain, and I think it is irrelevant and immaterial for any purpose, to any of the issues in this case, it being my contention that it does not make any difference.

That thereupon the objection was overruled by the Court and an exception was allowed.

A. I am not sure where Oren Busard was at the time. He was here shortly afterwards, but he may have been working there at the time, but he was either working for John B. Stevens & Company or working around town.

(Testimony of H. C. Comstock.)

The men I have mentioned constituted all the witnesses in the Merrill case except the doctors and excepting Busard. The witnesses I mentioned were the witnesses in the Merrill action, except Busard. I am a little dark in regard to Busard. I would like to explain if you will allow me. Busard was with us and worked with us some time about the time this [103] summons and complaint was served, but he was not a witness for us.

He disappeared before the suit was tried.

Mr. Merrill told me that he had fell and hurt his side. This was either the 14th or 15th of June, 1909. That is all I know about it. I never heard anything more about it after that. He did not say any board had broken on the hopper. He did not tell me when he had slipped and fallen. He just happened to tell me as he met me in the warehouse.

At the time I took up the investigation with Mr. Moore, when the complaint was served, I told him what Mr. Merrill had told me of having fallen or slipped and hurting his side.

That thereupon the witness was excused temporarily.

[Testimony of James A. Bradley, for Plaintiff (in Rebuttal).]

That thereupon JAMES A. BRADLEY was sworn and testified in behalf of the plaintiff as follows:

Direct Examination.

(By Mr. da PONTE.)

Tacoma Day at the Seattle Exposition was July 16, 1909, and this was conceded.

[Testimony of H. C. Comstock, for Plaintiff (Recalled in Rebuttal).]

That thereupon H. C. COMSTOCK was recalled for further examination and testified as follows:

Cross-examination.

(By Mr. HOLT.)

I last saw Busard between the time the summons and complaint were served and the time of the trial. He was working at the warehouse.

Mr. Ramm did not come over and consult with me about the accident to Merrill *to Merrill* or at any other time. I know him but I did not talk to him.

I did not tell Mrs. Tute what she said. I never heard about Merrill being hurt except some time in June, when he told me that he had slipped and fallen. I swear positively to that. [104] I testified as a witness in the case of Merrill against John B. Stevens & Company. I was one of the chief witnesses.

That hopper was boarded up on two sides. It had a cover over it. The side next to the car was open, except for the machinery that was in it. The side next to the platform butted up against the platform. There were two posts next to the platform, two posts next to the car. These posts supported the framework for the hopper. The hopper was boarded up with boards on each side. Mr. Merrill testified that he stepped on the edge of the top board on the north side in an effort to step to the door of the car and that the board being insufficiently nailed, broke off with him and let him down on his side. That is what he testified to, I heard him.

(Testimony of H. C. Comstock.)

The posts of the hopper were all moved when the hopper was altered. When the hopper was altered all the plank on both sides were taken off and some of the plank were put back on, but some new plank were put back on and the hopper was widened and enlarged.

After the suit of Merrill was brought I went and tried to find the plank and posts from the old hopper. I found them under the warehouse where they were all piled. I found the same plank. I had not nailed it back on. It never went back on and I did not testify on the former trial that I nailed it back on.

The posts were all taken out. They have been put back in but they were moved and new posts were set up for the framework and I think one of the old posts was left inside of the framework.

I do not think I testified that they used the board which Merrill claimed to have broke, in constructing the new hopper. I know that this board had not split with Merrill. [105]

That thereupon the following question was put to the witness by the attorney for the defendant:

Mr. HOLT.—Q. (Reading from the testimony in the other case.) "Q. Did you find the board? A. We found the board. They used the north board on the new hopper they constructed. Q. The north board? A. Yes. Q. Did you find another board? A. We found another board." Did you testify to that, Mr. Comstock? Were you not also asked this: "Q. Did you find the top board, what you conceived

(Testimony of H. C. Comstock.)

to be the top board?" And did you not answer, "No, sir?"

A. I do not think I did. I think we found the top board.

Q. I am asking you whether you made those answers on the former trial of this case. Were you not then asked this question, "Q. You did not find that?" And did you not answer, "I do not think we did. If I remember right it was the bottom board," is that correct?

A. It must be if it is in the testimony.

Q. And were you not asked this, "And they used the middle board?" And did you not answer, "I think that was the one." Do you remember about that? A. I do not remember it now.

Q. And were you not asked this, "You saved one of those boards until the fire?" And did you not answer, "Yes, sir"?

A. I think I had some of the boards until the fire. I know I had the important ones.

Q. Didn't you swear as I have asked you here (indicating) that it was the bottom board you found, and it was the top board broke off with Merrill, that he stepped on the top board of the hopper and the board broke off, and didn't you swear as I have read to you that the board you found was the bottom board?

A. I could not remember whether I swore to that or not. [106]

I do not know whether my recollection is as good as it was then. It has been a long time since I gave

(Testimony of H. C. Comstock.)

the evidence. I know I looked up all the stuff and knew when I had at that time. I knew what boards I had taken inside and what boards had been used on the outside. It is very likely that my testimony at that time would be more correct than it is now.

I did testify that the posts over next to the platform showed how many nail holes where the top plank was. I think one of the posts on the outside was used back again. That is the post to which the plank was nailed.

When I spoke to Mr. Stevens about Merrill's wages I did not know that Merrill had been hurt and did not tell Mr. Stevens so and I did not tell Mrs. Tute that I was sorry he got hurt and would treat him as I would any other man that got hurt. I had no conversation with Mrs. Tute at all. I heard the testimony of Mr. and Mrs. Merrill in which they spoke of certain things. I said about the payment of wages to him. That testimony is not correct. None of those conversations took place.

I heard about Merrill throwing the hammer at Johnny Martin, who joshed him about his accident at the time of the trial. I never heard of it until after the summons and complaint was served. Merrill told me in June that he fell and hurt his side. When I spoke to Mr. Stevens about paying Merrill's wages I asked him what I should do in regard to giving him some money on his wages, and Mr. Stevens told me to use my own judgment and give him what I thought was right. Do not know whether this was before or after he went to the hospital, but I did

not say anything to Merrill on the subject. The reason I did not speak to Merrill after I spoke to Mr. Stevens is because I never say anything to any man about what I am going to give him when I give it to him for charity. [107] As a matter of custom I refrain from letting him know that I was going to pay part of his wages, even when I have authority from Mr. Stevens to do it.

I told Mr. Moore about what I told Mr. Stevens and probably about the same time. Mr. Moore approved of it. I do not remember that I told him what it was for. I do not remember that I went into any details and he followed my recommendation. I think Mr. Merrill's wages were paid something like three or four weeks. I was there when they quit paying them. I do not remember whether I went to Mr. Stevens and Mr. Moore and came back and told Mrs. Merrill we would not pay any more wages. I remember she came down there and I went into the office and asked about it. Mr. Merrill and I were friends, not in particular, not intimate. I had never been to Merrill's house before.

The doctor did not mention about intending to perform any operation when he telephoned to me, nor did he mention anything about having one of his kidneys fractured. He said his reason for calling me up was that Merrill had come to him sick and he told Merrill it would be necessary for him to lay off a few days. He said that Mr. Merrill seemed to think I could not get along without him. I said, "It is foolishness on Mr. Merrill's part to think that I

(Testimony of H. C. Comstock.)

cannot get along without him. I do not expect a man to work who is sick and not able to work. Dr. Read did not call me up and say that Merrill was there; that he was suffering with a fractured or broken kidney on account of being hurt down there at your mill and that it was going to be necessary for him to have an operation, he thought, in a few days, and that if John B. Stevens & Company wanted to have a physician represent them at that operation that they could do so. Nothing of the kind was said. [108]

I talked to Merrill the next day at the warehouse. He came into the warehouse. I do not know by which door he left. I did not see him except when he was inside of the warehouse. I did not ask what was the matter with Merrill. The doctor didn't tell me. I never had curiosity enough to ask him what was the matter. I might have asked how he was feeling. Did not know what was the matter. Did not know that he was passing blood from his kidneys at that time. Did not ask him about these things because I do not ask people what is the matter. Sometimes they do not want to tell.

I was at Merrill's house once before he went to the hospital. I do not know what time of day it was when I went up to see Merrill. It was during the day time; sometime while I was up town. I simply went up to see him as I would have to see anybody that was sick. I did not have curiosity enough to ask him what was the matter with him. I did not think he knew. I did not know how he was affected.

(Testimony of H. C. Comstock.)

The doctor told me he did not know what was the matter with him when he was talking to me at my house. He was taken to the hospital in the forenoon. Do not know whether he called me up or sent word that he was going and would like to see me. I talked with him a little when I went up there. I did not say they were going to pay his wages. Did not ask what was the matter.

Did not ask Merrill what the operation was to be for. I did not ascertain from him what part of him was going to be cut open or why it was. I knew he was going to the hospital. Did not know what he was going there for. I did not know he was going to be operated on. I thought he was going there because he was sick. I just went up to see him. I am under the impression that he sent me word that he was going to the hospital and that he would like to see me before he went, or something [109] like that. I cannot remember what we talked about. I went up there expecting to talk to him, but when I go to see a sick person I do not talk very much with them or stay very long. Just to see how they are feeling and getting along. I did not testify that he called me up but that he wanted to see me. I helped put him into the ambulance. Did not talk to him about any accident or wages or to his wife about any accident or his wages or to Mrs. Tute about the accident or his wages. The only thing I did was to look on while he was being carried to the hospital and assist in putting him into the ambulance. I do not know what he sent for me for.

(Testimony of H. C. Comstock.)

I tried to get Busard and could not find him.

When I went to look at the hopper and the plank after the summons and complaint were served I had not forgotten that the hopper had long since been altered and new planks and new posts put on.

Q. You said, Mr. Comstock, at the time this summons and complaint were served, that you had a talk with Mr. Moore and spoke to him about Mr. Merrill having fallen in June. Am I correct? A. Yes.

Q. What made you mention that in connection with the summons and complaint to Mr. Moore? Did you think that was the time he fell on his side and broke the plank off the hopper?

A. I knew it was.

Q. And the plank was broken off the hopper, wasn't it? A. No, sir, it was not.

At the time the summons and complaint were served and I had the talk with Mr. Moore, I spoke to him about Merrill having fallen in June. I mentioned that in connection with the summons and complaint because I knew that that was the time he fell on his side and broke the plank off the hopper.

That was the time he fell on his side, but the plank was [110] not broken off the hopper. I swore in Merrill's case that the plank had never broken off the hopper and that was the point in issue in that case.

Redirect Examination.

(By Mr. da PONTE.)

The only fall I ever heard about was the one which Merrill told me about. When the summons and com-

(Testimony of H. C. Comstock.)

plaint was served was the first knowledge that I had that there was any claim about the hopper being broke. The model of the hopper [111] was made for the use of Mr. Holt in the trial of that case. It was reproduced just as it was before the changes and it was produced in court.

I went to look for the boards which had been taken out of the hopper at the time it was altered and I found them under the platform and they were the boards that were burned up in the fire.

Recross-examination.

(By Mr. HOLT.)

I found part of the boards that had been taken from the hopper when it was repaired. I found all that had not been put back. There were certain marks on the boards by which I knew them. I do not know why they were saved. I knew the boards. The hopper was a correct model.

Witness excused.

Thereupon Mr. da Ponte, attorney for the plaintiff, made the following offer and the following proceedings were had:

The answer to plaintiff's amended complaint was thereupon offered in evidence as Plaintiff's Exhibit 4. The said answer was in the following language:

[Plaintiff's Exhibit No. 4—Answer.]

"Comes now the defendant in the above-entitled action and for its amended answer to the complaint of the plaintiff therein:

I.

Answering paragraph III of said complaint, de-

fendant denies that the injury, or the accident, referred to in paragraph III of said complaint, was covered by the policy of insurance therein referred to. Defendant admits that payment of the judgment, referred to in said paragraph, to the extent of Five Thousand Dollars was demanded from it and that [112] it wholly failed and refused to pay the same or any part thereof; but it denies that its failure and refusal to pay the same, or any part thereof, was in violation or disregard of the undertaking referred to and set forth in the same complaint, and as to the other allegations in said paragraph contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of them and each of them, except it admits that on or about the 15th day of June, 1909, the I. B. Merrill, referred to in said paragraph, sustained an injury due to an accident;

AND FOR A FURTHER ANSWER TO PLAINTIFF'S COMPLAINT AND AS A FIRST AFFIRMATIVE DEFENSE THERETO, defendant alleges:

III.

Defendant alleges that the accident and injury to I. B. Merrill, referred to in plaintiff's complaint, occurred on or about the 15th day of June, 1909, and that the said plaintiff, through its officers and agents, knew of the said accident at the time it occurred and knew that the said I. B. Merrill had been injured thereby, but that the said plaintiff, in violation of the terms and conditions of the said policy, failed to give to this defendant, or to any of its officers or

agents, or to its manager for the United States, or to its duly authorized representative for the locality in which the said policy was issued, any notice thereof, in writing or otherwise until about the 25th day of October, 1909, and at, or within a few days of the time of the commencement of the action of Merrill vs. Stevens & Co., referred to in plaintiff's complaint;

AND FOR A FURTHER ANSWER TO PLAINTIFF'S COMPLAINT, AND AS A SECOND AFFIRMATIVE DEFENSE THERETO, defendant alleges:

I.

That, at the time of the accident to I. B. Merrill, referred to in plaintiff's complaint, the plaintiff, through [113] its officers and agents, well knew that the accident had happened and knew of the nature and character of the injuries sustained by the said Merrill; that the said accident occurred in the month of June, 1909, but that, notwithstanding this knowledge on the part of the plaintiff, it gave to the defendant no notice of the happening of the said accident, and this defendant had no knowledge or information thereof, until after the commencement of the action by the said Merrill against said plaintiff, referred to in plaintiff's complaint, which was on or about the 25th day of October, 1909."

Thereupon John B. Stevens was recalled by the plaintiff for further examination and testified that when he met Merrill on the bridge he was on foot.

That thereupon the defendant, to maintain its

case, introduced the following evidence and the following proceedings were had:

[Testimony of Mr. da Ponte, for Defendant (in Surrebuttal).]

Mr. HOLT.—I will call Mr. da Ponte to the stand.

Direct Examination.

(By Mr. HOLT.)

Q. I hand you, Mr. da Ponte, the original complaint in the case of John B. Stevens & Company versus Frankfort Marine, Plate Glass Insurance Company, which you will recognize as this case?

A. (Examining.) Yes, sir, this is it.

It was thereupon admitted in evidence as Defendant's Exhibit "A," and is in the following words and figures, to wit:

[Defendant's Exhibit "A"—Complaint.]

"The complaint of the plaintiff for cause of action against the defendant alleges:

I.

That plaintiff is a corporation organized under the laws of the State of Washington, and has complied with all of the laws of said State and has a license and permit to do business [114] therein. That defendant is a corporation organized with power and authority to do an insurance and indemnity business, and to issue policies or undertakings to indemnify employers from damages on account of personal injuries received by their employees, in consideration of the premium paid therefor.

II.

That on or about the 17th day of November, 1908,

in consideration of a premium of $73.00 paid by plaintiff, defendant executed and delivered to plaintiff a certain contract of insurance or indemnity, wherein and whereby defendant agreed and bound itself to indemnify plaintiff against loss arising from legal liability for damages on account of bodily injury or death suffered by any employee of plaintiff resulting from any and every accident of whatsoever nature or cause happening in, upon or about the premises and in the business of plaintiff, not to exceed, however, the sum of $5,000.00 for injury or death to any one employee, for the full period of one year from date of said policy, to wit: for the period of one year commencing the 17th day of November, 1908, and ending the 17th day of November, 1909.

III.

That on or about the 15th day of June, 1909, and while said policy was in full force and effect, one I. B. Merrill, an employee of plaintiff, sustained an injury due to an accident, the same being within the terms and covered by said policy, and thereafter, to wit, in the month of October, 1909, said I. B. Merrill commenced an action at law against plaintiff in the Superior Court of the State of Washington in and for Pierce County, seeking to recover damages for bodily injuries received in said accident; and thereafter such proceedings were had in said cause that a verdict and judgment were rendered in favor of said I. B. Merrill and against plaintiff in the sum of more [115] than $6,000.00, which said judgment was affirmed by the Supreme Court of the State of Washington, but defendant, although requested to pay said

judgment to the extent of the sum of $5,000, wholly failed and refused to pay the same, or any part thereof, in violation and disregard of its aforesaid undertaking, and thereupon, to wit: on or about the 1st day of January, 1911, plaintiff was forced to and did pay off and discharge said judgment by paying to said I. B. Merrill the full amount thereof, together with costs.

IV.

That it is further provided in and by said policy that in case of legal proceedings to enforce a claim against plaintiff covered thereby, that defendant would, at its own cost, undertake the defense of the same, but notwithstanding its agreement so to do, and notwithstanding that plaintiff gave immediate notice of the commencement of said action and requested defendant to undertake the defense of the same, defendant, in violation of its said contract, failed and refused so to do, and plaintiff was forced to and did defend said action at its own expense, and expended as necessary costs and attorney's fees therein, including costs recovered by I. B. Merrill, plaintiff therein, and interest on the said judgment pending appeal, the sum of $1,072.95, which plaintiff paid off and discharged upon the affirmance of the said judgment by the Supreme Court, as aforesaid.

V.

Plaintiff further alleges that it duly performed each and all of the matters and things, and complied with all the conditions of said contract of insurance, as provided in said policy, which were incumbent upon it, but the defendant breached the same and re-

(Testimony of Mr. da Ponte.)

pudiated all liability upon its part, and still continues [116] so to do and refuses to reimburse plaintiff for the said sums so paid by it, or any part thereof, and the same is still due and unpaid.

Wherefore plaintiff prays for judgment against defendant in the sum of $6,072.95, and for legal interest and costs."

Q. Is it not true, Mr. da Ponte, that it was alleged in that complaint that the accident to Merrill occurred about the 15th day of June, 1909?

A. Yes, it is so stated.

Q. Now, afterwards, Mr. da Ponte, an amended complaint was filed by you? A. I think so, yes.

Q. I now exhibit to you the original of the amended complaint on file in the case.

A. (Examining.) Yes.

Q. I will ask you if it is not true that in the second line of paragraph 4 of that complaint the words "On, to wit, July 19th, 1909" are not interlined?

A. Yes, sir, that being the only date stated.

Q. Now, is it not a fact that that interlineation was made by you after this complaint was filed under an oral stipulation or agreement that it might be made without the filing of a new pleading, for the purpose of convenience.

A. I could not say, Mr. Holt.

Q. Now, refresh your recollection a little, Mr. da Ponte.

A. If you are willing to say so, I am willing to admit it.

Q. I am not on the witness-stand. You excluded

(Testimony of Mr. da Ponte.)

me, you know. A. I cannot tell.

Q. It looks very much that way.

A. The allegation without the interlineation was "That while said policy was in full force and effect on I. B. Merrill employed [117] by the plaintiff was injured," and then the interlineation fixed the date, "On, to wit, July 19th, 1909."

Q. Don't you recall that instead of filing a new pleading, rewriting the whole pleading, you asked consent to write it in with a pen?

A. I cannot remember it, but won't say it is not true. If you say so, I am willing to admit it. I won't question it if you say so.

Q. It is true that your original complaint reads that the accident occurred in June 15th?

A. Yes, sir.

Q. Is it not true that you filed an amended complaint then and did not say when it took place, except as fixed by the interlineation?

A. Yes, sir. That is true.

Q. Now, see if you cannot refresh your recollection about that.

A. I told you if you say so I would concede it, but I cannot testify to something I cannot remember. If you ask me if I remember I cannot tell you. If you push me to it, I will concede it.

Q. No, I do not want that.

A. Well, then, that is all I can do for you.

Q. I will show you now the reply of John B. Stevens in this case and I will ask you to look at it and see if it is not the reply to the answer to the amended

(Testimony of Mr. da Ponte.)

complaint. This paper I have handed to you is the paper I have indicated. A. Yes, sir.

It was thereupon admitted as Defendant's Exhibit "B," and is in the following language:

[Defendant's Exhibit "B"—Reply.]

Comes now the plaintiff and makes reply to defendant's answer to plaintiff's amended complaint as follows: [118]

I.

Replying to paragraph "II" of said answer plaintiff alleges that in said original action of I. B. Merrill vs. John B. Stevens & Company it is alleged in plaintiff's complaint that said accident for which said suit was brought happened on the 19th day of July, 1909, as appears from the complaint therein attached to plaintiff's amended complaint, and said allegation was put in issue by the answer filed therein, as appears from said answer, a copy whereof is hereto attached, marked Ex. "A." That one of the issues tried and determined in said cause and found and passed upon as a basis for the judgment rendered in said suit of I. B. Merrill vs. John B. Stevens & Co. was whether said accident occurred on the 19th day of July, 1909, or on or about the 15th day of June, 1909, and said issue was determined against this plaintiff, defendant in said suit of I. B. Merrill, and it was adjudicated that said accident happened on said 19th day of July, 1909, and said finding and judgment is conclusive on the parties hereto, and plaintiff now pleads the same as *res adjudicata* of the issue now sought to be raised by defendant as to the date of said accident.

II.

Replying to defendant's first affirmative defense, plaintiff admits that the policy was issued in the State of Washington, but as to the allegation that said accident happened on or about the 15th day of June, 1909, plaintiff here adopts the plea of *res adjudicata* stated in paragraph "I" of this reply. Plaintiff denies that it knew of the injury or accident to the said I. B. Merrill on or about the 15th day of June, 1909, or at any time prior to the 14th day of October, 1909, but admits that it gave no notice of said accident prior to said 19th day of October, 1909, and alleges that it had no notice or knowledge whatever **[119]** of the accident or injury to the said I. B. Merrill until the 19th or 20th day of October, 1909, and immediately upon learning thereof, and on the said 19th or 20th day of October, 1909, it gave due notice to defendant's duly authorized representative for the locality in which said contract was issued in writing, and defendant never at any time made objection to the form or sufficiency of said notice, except only that defendant pretended that same was not given in time, as required by the terms of said contract of insurance, and plaintiff admits that defendant declined to admit liability for said accident giving as reasons therefor failure of plaintiff to give immediate notice of said accident, as required by said contract. And for further reply to said first affirmative defense plaintiff alleges that said policy provided "that upon the occurrence of an accident . . . the insured shall immediately, and at the latest within ten days . . . give notice in

writing of such accident," etc., and it was impossible for plaintiff to comply therewith for the reason that it had no knowledge of said accident until long after the time said provision required notice to be given thereof.

III.

Replying to defendant's second affirmative defense, plaintiff here adopts the reply to defendant's first affirmative defense stated in paragraph "II" of this reply. And further replying thereto plaintiff denies that by reason of its failure to give notice and investigate the accident, the evidence became destroyed and the witnesses scattered, and by reason of certain alterations made in the structure at which the accident occurred, it was no longer possible to defend said action. But plaintiff admits that there was an alteration made in said structure, but alleges that the same was slight and immaterial [120] and in no way prejudicial to the defense of said case, and said alteration was made prior to the time that plaintiff knew of said accident or that said structure was claimed by said I. B. Merrill to have been responsible therefor or connected therewith in any way. And plaintiff alleges that said structure was totally destroyed by fire without its fault long prior to the time said suit of Merrill was or could have been tried, and in any event could not have been available for use as evidence therein.

Wherefore plaintiff prays as in its complaint.

EXHIBIT "A."

Comes now the defendant in the above-entitled action, and in answer to plaintiff's complaint therein;

I.

Defendant admits that at the time referred to in paragraph numbered 2 of plaintiff's complaint, he, the said plaintiff, had been and was in the employ of this defendant running certain machines situate in its warehouse, but it alleges in this connection that the running of the said machines was only one of the duties which plaintiff was employed to perform, and that among his duties was that of assisting in the unloading of grain from the cars to the elevators in defendant's warehouse.

II.

Defendant denies each and every the allegations contained in paragraph numbered 4 of said complaint, except it admits that the plaintiff moved the lever shutting off the supply of grain from the hopper to the screw.

III.

Defendant denies each and every the allegations contained in paragraphs numbered 3, 5, 6, 7 and 8, in said complaint contained. [121]

IV.

Answering paragraph IX of said complaint, defendant denies that the plaintiff sustained great or permanent or any injuries by reason of the careless or negligent manner in which the framework around the hopper referred to in said paragraph was constructed, or by reason of the said framework breaking or giving way with plaintiff; and as to the other allegations in the said paragraph numbered IX contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the

truth of them and each of them.

V.

Defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations and each of them, contained in paragraphs numbered 10 and 11 of said complaint, except it admits that plaintiff was earning about eighteen dollars ($18) per week at the time therein referred to.

V.

Defendant denies the allegations and each of them, contained in paragraph numbered 12 of said complaint.

AND FOR FURTHER ANSWER to plaintiff's complaint, and as a first affirmative defense thereto, defendant alleges:

That the risks and dangers of performing the work which plaintiff was performing at the time of his alleged injury, in the manner in which he was then performing the same, were open, patent and obvious to plaintiff, and were all well known to him, or in the exercise of ordinary prudence and care should have been known to him.

And for further answer to plaintiff's complaint and as a second affirmative defense thereto, defendant alleges:

That at the time of the alleged injuries to plaintiff referred to in his complaint, as was well known to the said [122] plaintiff, there was a safe way in which he might have performed the work in which he was engaged, as well as an unsafe way, but that when the said knowledge, the said plaintiff volun-

(Testimony of Mr. da Ponte.)

tarily elected to perform the said work in the unsafe way, and while so doing he was injured and the injuries so received by him are the same injuries referred to in his complaint.

And for further answer to plaintiff's complaint, and as a third affirmative defense thereto, defendant alleges:

That the said plaintiff at the time of his alleged injury negligently, carelessly and unnecessarily placed himself in a dangerous position where he was likely to slip and fall, and while in the said position he did slip and fall, and was thereby injured, and the injury so received is the same pretended injury referred to in his complaint.

And now having fully answered defendant prays to be hence dismissed with its costs and disbursements in its behalf expended.

(Signed) HUDSON & HOLT,
Attorneys for Defendant.

The WITNESS.—It is the reply to your last answer but one.

Q. It is the reply to the answer to your amended complaint. A. I think not.

Q. One is by interlineation and one is by the filing of a new pleading?

A. We will concede that that date was an amendment. The reply is sworn to by Mr. Stevens and signed by me.

Q. I will ask you if it is not stated in this that "Plaintiff denies that it knew of the injuries or accident to the said I. B. Merrill on or about the 15th

(Testimony of Mr. da Ponte.)
day of June, 1909, or at any time prior to the 14th day of October, 1909." A. No, sir.

Q. That is not alleged here? [123]

A. October 19th, it is intended to be October 19th.

Q. And is it not alleged also as a plea of *res adjudicata* that it was settled and determined in the case of Merrill against Stevens that this accident occurred on the 19th day of July, 1909?

A. I do not know what is there. That is my contention. You have got the Reply. I want to make a statement in connection with this.

When I took charge of the case I brought suit for Mr. Stevens and of course I knew nothing of the facts. I got hold of such records as I could find. I do not know that I got them all, and I saw in connection with the papers that there was some contention made in the Stevens case that the accident happened on the 15th day of June.

Mr. da PONTE.—At that time it never occurred to me that the question of when the accident happened as between July 19th or June 15th would have any special bearing on the case and I gave that matter no consideration particularly as you will see the pleadings state that the accident happened while the policy was in full force and effect, and Mr. Holt states there was an interlineation which fixed the date as of July 19th. I believe it was not until that time that it occurred to me that there would ever be a serious contention in the case as to when the accident happened. After Mr. Holt took his position denying it happened on July 19th and alleged

(Testimony of Mr. da Ponte.)

that it happened on June 14th or 15th, I made that Reply, that in the Merrill case it had been adjudicated against Mr. Stevens. It was my idea and contention that the matter had been settled by the Merrill case and that if our contention had been sustained there would have been no judgment—(interrupted).

Mr. HOLT.—I object to that. **[124]**

The COURT.—You may simply explain the admission. That is as far as it can go.

Mr. da PONTE.—After Mr. Holt filed his answer, his last Answer, admitting it happened in July, I withdrew the plea of *res adjudicata* and filed another Answer, or the present Reply in the case.

Q. You say you filed your original Complaint alleging that this accident occurred in June. Taking the contention of Mr. Stevens in this former case that it occurred in June as the basis of your filing your Complaint in this case,—did you?

A. I took that date. I knew there was some testimony to that effect.

Q. And then subsequently you say when I filed an Answer you thought that the time might be material and in your Amended Complaint you put in a different date, July 19th?

Mr. QUICK.—If the Court please, I object to that as incompetent and immaterial, not surrebuttal or anything.

(Argument.)

No ruling.

Q. Then you filed a second Amended Complaint

(Testimony of Mr. da Ponte.)

and then you left it out altogether?

A. I cannot say that was left out altogether but it was dictated.

Q. And then you filed another Amended Complaint and you interlined—(interrupted).

A. No, sir.

Q. You changed it to July 19th?

A. To-day the date in there is July 19th.

(Witness excused.)

[Testimony of I. B. Merrill, for Defendant (Recalled in Surrebuttal).]

That thereupon I. B. MERRILL was recalled by the defendant for further examination:

That thereupon the attorney for the defendant asked him: **[125]**

Q. You were hurt in the month of June?

This was objected to by the attorney for the plaintiff as not surrebuttal and as having been gone into before.

The COURT.—The objection is overruled.

Thereupon it was conceded by the plaintiff that Merrill met with no accident in the month of June, 1909.

Thereupon the witness testified: I had no conversation with Mr. Comstock in the month of June in which I told him that I had fallen and hurt myself. I never fell and hurt myself at the warehouse more than once.

Q. I will ask you, Mr. Merrill, whether you were in the office of Dr. Read at the time that conversation was taking place?

(Testimony of I. B. Merrill.)

Mr. da PONTE.—Wait a minute. The witness testified that the conversation that he heard occurred with Mr. Moore and he never claimed that Doctor Read had any conversation with Mr. Comstock.

Mr. HOLT.—I made an effort to read his deposition in evidence on that subject, but the Court excluded it.

The COURT.—As the Court recalls your testimony, Mr. Comstock's testimony was that Doctor Read called him up at his house, and that Dr. Read's testimony, as the Court recalls it, is that he called up John B. Stevens & Company.

Mr. HOLT.—Doctor Read said that he could not remember anything about it and Mr. Comstock testified—(interrupted).

The COURT.—That testimony was that he did not call up John B. Stevens & Company.

Mr. QUICK.—And the doctor testified that he could not remember.

Mr. HOLT.—Yes. Now, that eliminated Doctor Read entirely. Mr. Comstock goes on the stand and testified to a conversation over the phone that it was at his house between he and Doctor Read. I asked him if Doctor Read did not say to him certain things in that conversation. I now propose to show by Mr. Merrill that **[126]** he was sitting in Doctor Read's office at the time of this conversation and that he heard what Doctor Read said.

Mr. da PONTE.—Now, unless he can testify to whom he said it—(interrupted).

Mr. HOLT.—It will be for the jury to say whether

(Testimony of I. B. Merrill.)

two such conversations took place between he and Doctor Read on this subject.

The COURT.—Unless you can show some circumstance that would justify the Court in submitting the question of whether he was talking to Mr. Comstock or not, the objection will be sustained.

Mr. HOLT.—Mr. Merrill, were you—I will ask you the preliminary questions and then stop. Were you in Doctor Read's office on the date you consulted him about your injury when he had a talk over the telephone with reference to you? A. I was.

Q. Do you remember anything that was said by him over the telephone to indicate to whom he was talking?

Mr. da PONTE.—I object to that.

Objection overruled.

A. Yes, sir.

Q. What was it?

Mr. QUICK.—I object to that as incompetent, immaterial and hearsay.

Mr. HOLT.—I have asked the witness if he knew of anything that occurred there that would indicate with whom the doctor had the conversation.

The COURT.—Objection sustained as to exactly what was said.

Mr. HOLT.—What was it that indicated to you with whom this conversation by Doctor Read was being held?

Mr. da PONTE.—That calls for an answer, an objection to which has already been sustained. **[127]**

(Testimony of I. B. Merrill.)

The COURT.—You may ask him if he called the person by name.

Q. Mr. Merrill, was anyone's name used by Doctor Read in that conversation?

Mr. da PONTE.—I object to that. (Objection overruled.)

A. He wanted to know who he was talking to and as near as I could understand it was Mr. Comstock, that was what Doctor Read said.

Q. Did Doctor Read say who he was talking to?

A. Yes, sir.

Q. Do you know whether he called up John B. Stevens & Company? A. He did.

Q. How do you know that?

A. I do not know only from what he said.

Q. Did you hear the number?

A. I did not exactly know their telephone number.

Q. Did he say that he was going to call up John B. Stevens & Company or make any declarations on that subject, or did he make any declarations on that subject at about the time he went to the telephone?

Mr. QUICK.—I object to that as incompetent.

The COURT.—Objection sustained.

Mr. HOLT.—I will try in every way—if your Honor has anything to suggest as to what occurs to your own mind about the foundation to lay for this—I am going to get it in if I can, this conversation of Doctor Read about which Mr. Comstock testified.

The COURT.—Any part of the conversation that he heard that would indicate to whom he was talking, you may go that far, and then when you do that, why

(Testimony of I. B. Merrill.)
there is nothing else in the conversation that will be permitted.

Mr. HOLT.—I will endeavor to do that as far as I can.

Q. Can you remember what Doctor Read said? [128]

A. He said,—he asked who he was talking to, who was at the phone.

Q. You did not hear the answer?

A. Doctor Read said he was talking to Mr. Comstock.

THIRD EXCEPTION.

Mr. QUICK.—I object to that.

The COURT.—Not what he said to you, but what he said in the phone.

A. Why, he said I was not able to work.

The COURT.—Objection sustained and the jury will disregard that.

Mr. HOLT.—If your Honor please, Mr. Comstock says that he had a conversation with Doctor Read at that time in which Doctor Read said certain things to him. Now, this connects Mr. Comstock up as the man with whom Doctor Read was holding this conversation.

The COURT.—There is too much doubt about it. Exception allowed.

Mr. HOLT.—I will have to proceed one or two questions further, if your Honor please.

FOURTH EXCEPTION.

(By Mr. HOLT.)

Q. What else, if anything, did Doctor Read say to

(Testimony of I. B. Merrill.)

this man who was talking over the phone at that time?

Mr. QUICK.—I object to that as incompetent.

The COURT.—Objection sustained. Exception allowed.

FIFTH EXCEPTION.

(By Mr. HOLT.)

Q. Now, the question I want to ask now, under the rule, will have to be leading in form because I am going to try to put the same one to him that he put to Mr. Comstock. Did Doctor [129] Read say to this person in that conversation that you were likely to have to undergo an operation because of the injury to your kidneys or kidney, that you received, and that if they wanted a physician, if John B. Stevens & Company wanted a physician they could have one, or was that the substance of it?

To which question counsel for plaintiff excepted, because it was incompetent, and the objection was by the Court sustained and exception allowed.

That thereupon the witness Merrill testified as follows:

Mr. Comstock came to my house on his first visit after I was ill because I had my wife telephone for him to come up.

SIXTH EXCEPTION.

That thereupon the following questions were asked the witness and answers were made and proceedings had in reference thereto, as follows:

(By Mr. HOLT.)

Q. And did you, in your testimony—I wish you

(Testimony of I. B. Merrill.)
to state to the jury briefly what was said by you to him with reference to your accident at that time.

Mr. da PONTE.—That has all been gone into.

The COURT.—Objection sustained.

Mr. HOLT.—Now, if the Court please, the situation was this in this case: I called attention to it at the time. The plaintiff made out his case and kept Mr. Comstock off the witness-stand, refrained from using him, and compelled us to put in our testimony, and I took the deposition of Mr. Merrill which was read without any opportunity to know what they were going to prove by Mr. Comstock. Now, we could not ask questions that would exactly anticipate what Mr. Comstock was going to swear to when they used him. They held him off the witness-stand and they put him in in rebuttal, and now I want to ask Mr. Merrill what conversation took place at the time Mr. Comstock came up in answer to [130] his summons.

The COURT.—Ask leading questions to contradict anything, but do not ask him to repeat conversations.

Mr. da PONTE.—That is the very thing we put Mr. Comstock on to do, was to contradict these conversations that Mr. Merrill testified to.

Mr. HOLT.—I will ask this question and the Court will rule upon it and I will be satisfied: At the time Mr. Comstock came there, as you have testified, in answer to your summons, was anything said by you to him on the subject of your injury? Was anything said by him to you on the subject of the

(Testimony of I. B. Merrill.)

payment of your wages, hospital bills or anything of that kind?

Thereupon the plaintiff objected to the question as irrelevant and immaterial and as having been gone into before, and the Court sustained the objection and allowed the defendant an exception.

(By Mr. HOLT.)

I asked the question of whether anything on that subject was said.

The COURT.—He has already testified on that.

That thereupon the witness proceeded to testify as follows:

Cross-examination.

(By Mr. QUICK.)

I am positive that the accident for which I brought suit against John B. Stevens & Company and for which I recovered judgment, occurred on July 18th of 19th.

SEVEN EXCEPTION.

That thereupon it was stipulated by the parties in open court that the amount of the sums paid by John B. Stevens & Company in satisfaction of the judgment recovered by Merrill and costs and interest thereon, might be given to the jury in the form of a statement to aid them in determining the amount [131] and the interest, but that it was expressly understood that this was with the understanding that its relevancy was objected to and the objection reserved on the ground that there could be no recovery for any sum under the policy, and that thereupon the defendant waived all objection as to the

form of the statement, but objected to the evidence of the amount of the payments, principal and interest, going to the jury, for the reason that there could be no recovery for anything under the policy, but the objection was overruled and an exception allowed by the Court.

Thereupon the defendant rested and the case was argued to the jury by the counsel for the respective parties.

That thereupon the Court delivered to the jury the following instructions, which were all the instructions given to them by the Court:

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1739–C.

JOHN B. STEVENS & COMPANY,

Plaintiff,

vs.

FRANKFORT MARINE PLATE GLASS INSURANCE COMPANY,

Defendant.

Instructions.

GENTLEMEN OF THE JURY:

The argument having been completed in this case, the Court will charge you concerning the law. You will take the pleadings out with you. The court will outline the issues in the case, so that you may have them in your minds while you are listening to the Court's instructions. The important points in the case have been presented in the arguments. In this

case I have asked the Clerk to fasten together those pleadings that are going out as pleadings, because you will [132] remember that certain of the pleadings that have been superseded were introduced as evidence on account of admission in them, statements made concerning this date of the accident, particularly.

Now, the pleadings on which this case is tried are the Amended Complaint, the Amended Answer and the Amended Reply. I have asked the Clerk to fasten them together, and you will remember that when you go out into the jury-room when you are determining what the dispute is between the parties in this case.

Briefly, the Complaint alleges that John B. Stevens & Company took out an insurance policy for a year and paid for it, indemnifying them against loss for any injury to plaintiff's employees on its premises. That is the substance of it, that while that policy was in force one of plaintiff's men was hurt, that it called upon the insurance company to take care of the matter, to defend the company, that is after the suit was brought on account of the injury the company did this, that the insurance company refused to defend, that John B. Stevens & Company did defend and lost the case, and it was appealed and they eventually had to pay some $6,000.00 in damages to the injured workman, and in addition to that certain interest and costs in the lower court and the costs in the Supreme Court, and that the insurance company has not repaid any part of that amount.

The insurance company, the defendant in this case, comes in and admits a considerable part of this; admits the issuance of the policy; that it was paid for, and that it covered this accident, and that they refused to defend the action and that no part of the loss sustained by John B. Stevens & Company has been paid by them, and they set up as a defense and excuse for not paying for the injury or defending the case, that the policy provided that they were to have immediate notice upon the [133] occurrence of an accident; that that notice was not given, and that that failure to give notice exonerated them from any responsibility in the matter; that on account of the failure to give notice, the witnesses became lost, scattered, and the evidence disappeared, and that they could not successfully defend the case on that account, and that this failure to give notice was entirely the fault of the plaintiff. In substance that is an affirmative defense set up by the Answer.

The plaintiff comes back in its Amended Reply and denies this affirmative Answer, denies that any of the witnesses had been lost or evidence had been lost, or that the case could not have been as successfully defended after the notice was given as if it had been given earlier. That is an outline of the issues in this case.

You will observe as we have progressed in the case that most of the evidence and the argument is directed to one of the principal issues in this case, and that is whether notice was given by the plaintiff to the insurance company according to the terms of the policy. The policy provided that upon the oc-

currence of an accident, whether a claim was made on account of it or not, immediate notice, and not later than ten days, should be given in writing to the insurance company. That is the substance of that clause in the policy. Now, that term, "immediate notice," does not mean notice instanter, whether the plaintiff knew of the happening of the accident or not; it means notice given within a reasonable time, within reasonable promptness in view of all of the circumstances of the case. If the plaintiff gave notice to the defendant immediately after learning of it, if it was not of itself at fault in not learning of it sooner, and gave this notice, as I say, immediately, if it was not in fault, not having known of it, then it complied with that provision of the policy. You can readily see the purpose of a [134] provision of this kind, that prompt notice should be given to the insurance company to enable it to investigate the case and see whether it was one that should be defended, and if it was one that should be defended that it should have a good opportunity of making a defense and securing the evidence, as ordinarily evidence could be more easily secured and obtained and the facts more easily and quickly ascertained if an early investigation is made after the accident than if it is delayed unreasonably.

In this policy it provided that in case of an injury, that the company would not be liable in excess of $5,000.00 for the injury; that is substantially the provision, but the company, in addition to that obligation, undertook to either settle the case or defend it if suit was brought at its own cost. So, in this

case, as long as the liability was incurred by John B. Stevens & Company, which it paid, on account of this injury, of some $6,000.00, that is over $5,000.00 on account of the injury, appeals, interest and costs, if the plaintiff is entitled to recover, the defendant would not only be obligated to pay the $5,000.00 and interest on it, but also obligated to pay the reasonable and necessary expenses to which John B. Stevens & Company was put in defending the case in the Superior Court and also in the Supreme Court to which it was carried on appeal.

Now, regarding this issue raised by the defendant's Answer, that it was prejudiced by reason of this delay in the giving of the notice, and the Reply which was interposed, in effect that the defendant was not prejudiced, you can see that the matter divides itself into two heads, the defendant being obligated by the policy to defend the suit and obligated to pay the damages sustained by the injured man, in case it was lost,—there are two views to be taken of the matter, first, [135] whether there was anything in the delay in the notice, if it was delayed, was not given immediately as provided by the policy, and as I have instructed you, whether or not that interfered with or rendered more expensive or more difficult the defense of the case, that is, the conduct of the defense. If the plaintiff was to blame in not giving this notice immediately under the terms of the policy, and it would have been or rather was more difficult and expensive to defend it, that expense would be something that the defendant in any event was not bound to stand.

Then, the second question for you to determine is whether the plaintiff was at fault in any delay in giving this notice, that occurred, as well as whether the conditions were such as to thereby prevent a successful defense. If a successful defense of the case was prevented or probably prevented by reason of this delay, then the $5,000.00 that they were obligated to pay by the policy, and the interest on it—the defense is not liable for that. You can understand the differences between mere conduct of a defense of litigation of that character, whether it was rendered more expensive or more difficult, and the question of liability or chance of making a successful defense had been rendered more difficult or lost.

The Court will read to you certain written instructions which have been prepared. Before reading them I will instruct you that the plaintiff is a corporation. It is claimed in this case by the defendant as one of the issues in this case that it had knowledge or should have had knowledge of this accident more than ten days prior to the time it gave the notice to the defendant. The only way that a corporation can gain knowledge or have notice is through its officers or agents. It is an invisible, intangible thing, a corporation, and only acts and can only be acted upon through its officers or agents. But it can have agents [136] who are not officers. Now, then, the knowledge either Mr. Stevens or Mr. Moore had, they being the managing officers of the corporation, president and secretary of the company, whatever knowledge or notice they had concerning the accident in which Mr. Merrill was in-

jured, that would be the knowledge of and notice of the plaintiff company here. But that is not all. A corporation may employ, as I said, agents who are not officers, for the performance of its labor. Now, having undertaken under this policy to give notice upon the occurrence of an accident to the defendant insurance company, it was the business of the company to take reasonable steps to comply with that undertaking. If the part of the work that fell to the lot of Mr. Stevens or Mr. Moore, president and secretary of the company, was of such an engrossing nature, or the circumstances were such that it would not be reasonably likely that they would know when an accident occurred upon their premises that might be made the basis of a suit by one of the employees, or for a claim, then it was the business of the company to take some steps to get that information other than defending upon what Mr. Stevens or Mr. Moore would merely learn in the discharge of their ordinary duties. If they entrusted this duty to either Mr. Comstock or Mr. Bass, or both of them, and relied upon them, or either of them, to keep track of and supervise the conduct of the business so they, Bass and Comstock, would know when an accident happened that might be made the basis of a claim, and communicate that fact to the officers of the company, Mr. Stevens or Mr. Moore, then, if Mr. Bass or Mr. Comstock, while acting in the capacity in which they were employed by the company, did learn of this accident, but failed to communicate that fact to either Mr. Stevens or Mr. Moore, that would not excuse the plaintiff for

the delay, because the knowledge of Mr. Comstock or Mr. Bass, under those circumstances, would be the knowledge of the company. I will read [137] certain instructions, and if they repeat to any extent the oral instructions which I have given you, you will not conclude that the Court is trying to impress one part of the case upon you to the exclusion of others.

"In this action the plaintiff alleges that on the 17th day of November, 1908, in consideration of a premium of $73.00 paid by plaintiff, the defendant executed a policy of insurance, agreeing to indemnify plaintiff from loss or damage on account of accidental injuries sustained by plaintiff's employees while working for plaintiff in its grain and feed warehouse in Tacoma for a period of one year, ending on the 17th day of November, 1909. And said policy of insurance further providing that in case of suit by any of plaintiff's employees to recover damages for accidental injuries received while working in plaintiff's employ that defendant would assume the defense of the same in court at its own cost and expense, and in case of judgment being rendered against plaintiff, John B. Stevens & Company, defendant would pay the same not exceeding, however, the sum of $5,000.00 for an injury or accident to any one employee, together with costs of suit.

It is alleged by plaintiff that while this policy of insurance was in force, one I. B. Merrill, an employee of plaintiff, was accidentally injured while in the discharge of his duties in plaintiff's warehouse, and that on or about the 29th day of October,

1909, said Merrill commenced an action against plaintiff, John B. Stevens & Company, in the Superior Court of Pierce County, seeking to recover damages from plaintiff on account of said injuries. Plaintiff alleges that it immediately notified defendant of the commencement of said suit of I. B. Merrill, and requested defendant to assume defense of the same, but that defendant refused to assume the defense of said suit unless plaintiff would release it from all liability for any [138] judgment that might be rendered therein, and denied all liability on said policy of insurance. That thereby plaintiff was forced to and did defend said suit at its own cost, and on a trial said I. B. Merrill recovered a judgment against plaintiff for more than $6,000.00, which plaintiff was forced to pay, together with about $250.00 interest and $825.00 costs and attorney's fees, and plaintiff claims judgment in this action against defendant for said sum of $5,000.00 interest and costs."

"Defendant by its Answer admits the execution of said policy of insurance and payment of the premium thereon, and admits the accident and injury to plaintiff's employee, I. B. Merrill, but alleges that plaintiff failed to give immediate notice of said accident to I. B. Merrill as provided in part 2 of said policy, and alleges that the giving of said notice was a condition precedent to any liability on said policy, and by the failure of plaintiff to give said notice defendant alleges it was released from all liability on said policy, and refused to defend said suit or accept said accident for that reason. Defendant also denies that plaintiff gave immediately notice of the

commencement of the said suit of I. B. Merrill, but admits that Summons and Complaint in that suit were sent to it by plaintiff.

For a further defense the defendant alleges in its Answer that I. B. Merrill received the injuries referred to on or about the 19th day of July, 1909, and that plaintiff had knowledge of said accident and injuries to said Merrill at the time but gave no notice in writing to defendant or its representatives in this locality, until the latter part of October or first of November following, as required by said policy of insurance, and that for that reason defendant refused to undertake the defense of said suit, and denied all liability under the policy. **[139]**

Defendant also states that by reason of plaintiff's failure to give notice of the accident and its failure to preserve the testimony and investigate the accident, the evidence was destroyed and the witnesses scattered, and when the suit of Merrill was brought, by reason of plaintiff's neglect to properly attend to the same, and by reason of certain alterations and changes that plaintiff had made in the structure at which the accident occurred, it was no longer possible to defend said suit of I. B. Merrill."

"Plaintiff also by its Reply denies that by reason of its failure to give notice and investigate the accident the evidence became destroyed and the witnesses scattered, and also denies that by reason of alterations made in the structure at or about which the accident occurred it was no longer possible to defend said suit of I. B. Merrill. But plaintiff admits that alterations were made in said structure

but alleges that same were immaterial and in no way prejudical to the defense of said suit of I. B. Merrill, and further states that said alterations were made prior to the time that plaintiff knew of the accident and injury to I. B. Merrill, or that said Merrill claimed that said structure was responsible for or connected with his said accident and injuries. Plaintiff also states that said structure was totally destroyed by fire without its fault before said suit of Merrill was tried and in any event could not have been had for use as evidence therein on that account."

"The Court instructs you that it appears without dispute that the policy of insurance sued on was executed and delivered by defendant, and the premium therefor paid by plaintiff, and that said policy constitutes a valid and enforceable contract between the parties, subject to the terms and conditions thereof."

"It also appears without dispute that plaintiff's employee, [140] I. B. Merrill, was injured through an accident while engaged in plaintiff's employ, and that said accident and injury was covered by the terms of said policy and defendant was bound to assume the defense of said suit at its own cost and to pay any judgment rendered therein, not exceeding $5,000.00 in amount, unless excused by failure on the part of plaintiff to give timely notice of the accident, as I will presently more fully explain."

"It also appears without dispute that defendant refused to defend said suit of I. B. Merrill and that plaintiff defended the same and that judgment was rendered in Merrill's favor for more than $6,000.00,

and said judgment was affirmed by the Supreme Court of Washington, and plaintiff was forced to and did pay off and discharge the same by paying the full amount thereof, and costs prior to commencing this action."

"You are instructed that the judgment rendered in favor of said I. B. Merrill against plaintiff, John B. Stevens & Company, is conclusive and binding upon the defendant, Frankfort Insurance Company, with respect to plaintiff's liability for said accident to I. B. Merrill, and the amount paid Merrill in satisfaction of said judgment, not to exceed, however, the sum of $5,000.00, the policy being limited to that amount, and such further sum as was paid by plaintiff, Stevens & Company, as the reasonable and necessary costs and attorney's fees incurred and paid in the defense of said Merrill suit, and if your verdict be in favor of plaintiff it will be for the sum of $5,000.00 (five thousand) and interest thereon at the rate of 6% from the date said judgment was paid."

Mr. da PONTE.—That has all been figured out.

The COURT.—The amount of costs, interest and attorney's fees are set out in the memorandum which counsel have agreed to in case your verdict should be for the plaintiff. I will not instruct you further upon that. [141]

"The policy of insurance sued on contains the following term, viz.:

" '2. That upon the occurrence of an accident, whether any claim be made in respect thereof, or not, the assured shall immediately and at the latest within ten days, give notice in writing of such acci-

dent to the company, addressed to the manager for the United States, at the office of the company in New York, N. Y. or to the duly authorized representative for the locality in which this policy is issued. If thereafter the assured shall receive notice of any claim arising out of an accident duly reported to the company as before provided, or of any legal proceedings to enforce such claim, he shall, within three days give notice thereof to the company in like manner, and shall forward to the company every Summons and process as soon as the same shall have been served on him.'

"The defendant alleges that the plaintiff failed to comply with the above provision respecting the giving of notice of the accident, and that for that reason it refused to accept the accident or defend the suit of I. B. Merrill.

"The Court instructs the jury that the requirement of immediate notice in the policy is not to be taken literally and as requiring notice under any and all circumstances immediately upon the happening of an accident under penalty of forfeiting all rights under the policy of insurance. The term must be given a reasonable and practicable construction and should not be construed so as to require an impossibility."

The Court has already defined to you what that would be. Immediately means with reasonable promptness. That means within a reasonable time, having in view all of the circumstances of the case but not to exceed ten days after the company did have knowledge of it. **[142]**

"Therefore if the jury believe from the evidence that plaintiff, though fully performing its duty as will be explained to you, had no knowledge of said accident at the time it occurred, and that it gave notice thereof immediately, and without unreasonable delay after learning of the same, and that, at that time, the witnesses to the accident were still in the plaintiff's employ and could have been interviewed by the defendant's representatives and statements taken and the defendant by then investigating could have learned of the material facts relating to the alleged accident, then, and in that case, the Court instructs you that the notice was timely, and defendant could not avoid liability on the policy upon the plea that notice of the accident was not given within the time provided for in the policy."

I will modify that last instruction somewhat. You will understand that as I have defined the meaning of that expression "immediately" to you, that if the plaintiff did give such notice, that is immediately, then it would not make any difference if the defendant had been prejudiced by the lapse of time between the time that the accident did take place and the time that the notice was given. The last instruction I gave you might mislead you on that.

"You are instructed, gentlemen of the jury, that the plaintiff in this action alleges in its complaint that Merrill was injured on or about the 19th day of July, 1909, while working in the employ of the plaintiff, and that afterwards the said Merrill sued the plaintiff and recovered damages for this injury and that the plaintiff paid the judgment and is entitled to

recover back from the defendant the amount so paid up to $5,000.00 interest and costs. You are further instructed that the plaintiff alleges that it did not know of this accident until the [143] 19th day of October, 1909, and that it immediately thereafter, and on the same day, gave notice to the defendant thereof, and that a lack of knowledge on the part of the plaintiff prior to that time is alleged as an excuse for not having given the notice before then. You are further instructed that the plaintiff in this action is seeking to recover the amount of the damages which it was compelled to pay for the injury by accident to Merrill, for which he brought suit and recovered, and that it is immaterial in this action whether this accident occurred in June or July."

For your consideration it is immaterial if it was the same accident, that is, it is immaterial as a matter of law whether it was covered by the policy or not, if it was the same accident, but it would be material for your consideration in determining whether notice was given seasonably and in weighing the testimony of the witnesses who have appeared before you.

"The question for you to consider and determine is whether the plaintiff knew, or in the exercise of reasonable diligence and care in the management and supervision of its business, in the manner I have indicated to you, knew or should have known of the accident more than ten days prior to the time when the notice was given to the defendant, or whether, if any other person than the officers of the company was charged by the company with the duty of acquiring such knowledge, such person knew or should

have known, in the exercise of reasonable diligence and care, of the accident more than ten days prior to the time when notice of it was given to the defendant."

"You are instructed, gentlemen of the jury, that in order to charge the plaintiff in this action with knowledge of the accident to Merrill it is not necessary for the defendant to show that the plaintiff or its officers knew exactly how or in what manner the accident to Merrill occurred, or the extent [144] of his injuries. On the contrary you are instructed, that if the plaintiff or any of its officers or persons charged by them with the duty of learning of such accidents and giving notice to the plaintiff or the defendant thereof, knew that Merrill had received a hurt while working in the course of his employment at the warehouse of plaintiff, it then became the duty of such officer or person, or some other officer of the plaintiff, to inquire into and investigate the hurt or injury and if, as a result of that investigation or inquiry, the plaintiff or its officers or the person charged with the duty as aforesaid, would have known of the hurt or injury received by him while performing his work at the warehouse of the plaintiff, then you are instructed that if the plaintiff or its proper officer or officers did not give notice in writing to the defendant within ten days after the time when such knowledge would have been acquired if investigation or inquiry had been made, the plaintiff is chargeable with the result of such failure and cannot plead a lack of knowledge as an excuse for

its failure to give the notice required by the policy."

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence that facts came to the notice, knowledge or attention of Mr. Moore or Mr. Stevens which would have caused a reasonable man charged with the duty of ascertaining when accidents occurred to the men to think or believe that Mr. Merrill had met with an accident while engaged in his work at their premises, then you are instructed that it was the duty of Stevens and Moore to investigate and ascertain the facts and that, if such an investigation would have resulted in a discovery by them that Merrill had met with an injury at the hopper of plaintiff, more than ten days prior to the time when they first gave notice to some representative **[145]** or agent of the defendant of the accident, then you are instructed that they are chargeable in law with all knowledge that such a reasonable investigation would have disclosed."

"Knowledge of any person if charged by the plaintiff with the duty of ascertaining whether men were hurt in any accident on the premises while at work for plaintiff, and informing plaintiff thereof, whether such person were Mr. Comstock or Mr. Bass or any other, if such knowledge was acquired by such person in the course of his employment it would be knowledge on the part of the plaintiff; if such person knew of Merrill's injuries, and knew that it was on his own premises and received while in the discharge of his duties. This would be true whether

the person informed the plaintiff or any of its officers or not."

"If the plaintiff's business was either so extensive or complicated or the circumstances were such that it was not reasonably probable that its officers would learn of accidents injuring its employees unless it promulgated rules and regulations among its employees and agents for that purpose and saw to their enforcement, it would be its duty then to promulgate and enforce such rules and regulations and if it did not do so it would be plaintiff's fault that it did not learn of the accident in this case with reasonable promptness, providing you find from the evidence it would have done so if such rules and regulations had been promulgated and enforced as aforesaid."

"You are instructed, gentlemen of the jury, that under the policy of liability insurance involved in this action, it was the duty of the plaintiff, through its managing officers, to exercise a reasonable degree of diligence and care to ascertain when accidents or injuries occurred to its employees while engaged in their work on the premises covered by the policy, and that this duty was not a passive one, but was an active one. You are further instructed in this connection that, if the duties [146] of the officers of the company and their relations to the men while they were engaged in their work, were such as not to bring them in contact with the men so engaged, and were such that they were not reasonably informed as to what accidents happened to their said employees while engaged in their work, and were

such that they might or likely would have no knowledge themselves of accidents thus occurring to their employees then it became the duty of the plaintiff to adopt such measures and require the enforcement of such rules and regulations as were reasonably calculated to insure the obtaining by them in some other way of prompt and definite information when their employees met with an accident or injury while in the course of their employment on the premises covered by the policy; and you are therefore instructed that under the policy it became the duty of the plaintiff to adopt either of two courses; first: To exercise, through its officers reasonable care and diligence in the management, supervision and ordering of its business so that they or some of them would be readily informed of accidents to its employees while engaged in the work of plaintiff at the place covered by the policy, or, second: To promulgate and require the enforcement of such reasonable rules and regulations as were calculated to insure its obtaining such information in some other way; and you are instructed therefore, that if the plaintiff in this action through its officers did not perform this duty and that as a result of such failure its officers failed to acquire knowledge of the accident and injury to Merrill until more than ten days after it occurred, and did not give notice until after acquiring such knowledge, then the lack of knowledge of the accident on the part of the plaintiff is no excuse for a failure to give the notice."

"You are instructed that the plaintiff was not required by the terms of the policy to give notice of

the accident until [147] it knew of it, unless, by the exercise of ordinary prudence and care in the management of its business and its supervision, it should have known of it sooner.

The plaintiff is a corporation and knowledge on its part must of necessity consist of knowledge on the part of some of its officers or agents. By the terms of the policy involved in this case the plaintiff undertook to give notice of accidents to its employees while engaged in its work at its warehouse, within ten days after the accidents occurred. This duty was an active one, that is to say: It required of the plaintiff that *if* should through its officers or agents exercise a reasonable degree of supervision over the management and conduct of its business, so that it would likely and probably know of such accidents to its employees. If the plaintiff discharged this duty and yet without fault on the part of its officers or agents, such an accident occurred without their knowledge, the plaintiff would not be in default if it gave notice within ten days after it knew of it. Before the plaintiff can urge a lack of knowledge as an excuse for a failure to give notice, however, it must be affirmatively shown that the officers and agents of the plaintiff discharged the duty to which I have referred and exercised a reasonable degree of diligence and care in conducting the business, or in providing such means by which knowledge of such accidents would come to them.

When I use the word 'agents' in this connection, I mean such persons other than officers of the company as were charged with the duty of reporting

such accidents to the officers of the company, where there was no assumption or performance of such duties by the officers themselves, nor any rules or regulations for such purpose.

If the officers of the plaintiff paid no attention to the [148] question of acquiring knowledge of such accidents and giving notice under the policy, and established no rules or regulations on the subject, requiring or directing others to give information to them of such accidents, and as a result thereof knowledge of the accident was not acquired by them, then the plaintiff cannot be heard to plead in this case a lack of knowledge of the accident.

If the officers of the plaintiff paid no attention to the question of giving notice of such accidents and did not exercise such a supervision and control over the men and management of the business as would render it reasonably likely or probable that they would know of such an accident, and if they did not establish any rules and regulations on the subject of acquiring knowledge of such accidents, and if they relied on someone of their employees to acquire such knowledge and impart it to them, then you are instructed that the knowledge of such an employee would be treated in law as the equivalent of knowledge on the part of the company."

"In this connection, the defendant claims that it was prejudiced for want of notice of the accident by reason of the fact that some alterations were made in the hopper upon which Merrill claims to have been injured. The Court instructs the jury that, if at the time the alterations were made in the hopper,

plaintiff did not know of the accident to Merrill, and did not know that Merrill claimed that the accident and injury were caused by a defect or break in the hopper, then plaintiff was not at fault in making such alterations and you cannot find for defendant on that account. Providing plaintiff had discharged its duty in taking all reasonable steps to be informed as I have already explained to you.

And you are further instructed in this regard that, if the defendant could have learned all of the facts concerning [149] the condition of the hopper, the manner in which it was constructed, and all the facts relating thereto, from the witnesses, after notice was given, so that the change or alteration in the hopper did not prevent the defendant from learning the condition of the hopper and satisfactorily establishing the same and its manner of construction at the time Merrill was injured, or the facts in connection with the alleged break of a board in the hopper, and that it was not prejudiced in its rights by reason of such alterations; then the fact that the hopper was altered, after the alleged injury to Merrill, would be immaterial and would not constitute grounds for the defendant refusing to accept and defend the suit brought by Merrill against John B. Stevens & Company."

"And further upon the question of notice of the accident to said I. B. Merrill, the jury is instructed that the policy of insurance does not stipulate to insure plaintiff against liability for any and all accidents whatever, but only for such accidents as might happen, in, upon or about the premises of plaintiff

and in plaintiff's business. The clause 2 in the policy requiring notice of accidents to be given defendant must be construed as relating only to accidents for which the defendant might be held responsible. Plaintiff was not required or expected to give defendant notice of any accident, except only such as were covered by the policy.

Therefore, the Court instructs the jury that the mere fact that plaintiff's officers, Stevens and Moore, or either of them may have known or heard that Merrill had fallen and hurt his side, would not alone be sufficient to require notice of that fact to the defendant unless it was enough to put a reasonable man upon inquiry to determine whether it was one covered by the policy. I have already instructed you about the duty **[150]** of anyone charged by the company in this manner if certain knowledge came to their possession, following it up and finding out whether there had been such an accident before plaintiff would be required to give notice if it had fully performed its duty in the matter of the supervision of its work, as I have before explained to you it must have had knowledge or notice that Merrill had met with an accident in, upon or about the premises of plaintiff and while engaged in plaintiff's business.

"The Court further instructs the jury that the failure or delay in giving notice, even though plaintiff had knowledge of the accident, would not of itself be a defense to plaintiff's suit. In order to be a defense such failure or delay in giving notice must have been prejudicial to the insurance com-

pany's rights. Therefore if notice was not given immediately as provided yet if the jury believe from the evidence that said suit of Merrill could have been defended by said company to as good advantage as if notice had been sooner given as required, it was bound to accept the accident and defend the suit. In other words, if the jury believe that the witnesses to the accident and all evidence were available and that the suit could have been defended as well as if notice had been sooner given, the failure to give notice sooner would not in any event be a defense, even though plaintiff knew of the accident at all times, and you will find a verdict for plaintiff."

"Another matter in issue relates to the allegation that by reason of plaintiff's delay in giving notice of the accident the witnesses were scattered. If the jury believe that such delay in giving notice was due to the want of knowledge of said accident by plaintiff and that the plaintiff was ignorant of it and without fault on its part, as before explained, [151] it would be immaterial that the witnesses were scattered, and you cannot find for defendant on that account."

"If you believe from the evidence that at the time said changes and alterations were made plaintiff did not know of the accident to Merrill, and was ignorant without fault on its part, then plaintiff was not at fault in making such alterations, and you cannot find for defendant on that account."

"The Court permitted certain testimony concerning conversations alleged to have occurred at Merrill's house, or at the hospital, between Comstock

and I. B. Merrill and between Comstock and Mrs. Merrill. This testimony was admitted for a limited purpose, as the Court explained to you at the time. And in this connection, you are instructed that the principal is charged with knowledge of all material facts of which the agent receives notice or acquires knowledge, while acting in the course of his employment and within the scope of his authority, whether the agent informs the principal of such facts or not. But you are instructed that a principal is not charged with knowledge of any fact which the agent may acquire while not acting in the course of his employment, or of information which the agent acquired while attending to business of his own. Therefore, you are instructed that, if you find and believe from the testimony that I. B. Merrill met with an accident on July 19th, 1909, and that at that time the foreman, Comstock was away on his vacation and did not know of the said accident, then you are instructed that any knowledge or information Comstock may have acquired concerning the accident while visiting at Merrill's house, or at the hospital unless he was there to see Merrill in the discharge of his employment by the plaintiff, would not be the knowledge of the plaintiff in this case, because not acquired by Comstock in the discharge of his employment [152] or in connection with matters within the scope of his authority as an agent or employee of the plaintiff, John B. Stevens & Company."

I instruct you that the burden of proof in this case is upon the plaintiff to establish by a fair prepon-

derance of the evidence on all the material points which are disputed by the defendant. That is, the burden of proof is upon the plaintiff to establish that it did give notice immediately as I have defined that term to you, after it acquired knowledge of the accident, and so far as any excuse offered by it, why there was a delay after knowing of the accident, the burden of proof is upon the plaintiff to show that it did not know it until such time as it gave the notice—testimony on plaintiff's part is that it was given the same day that it learned of it, and the burden of proof is upon the plaintiff to show that it lawfully discharged the duty of supervising this work and took reasonable steps to learn of the accident, as I have already defined to you that term. If you should find in this case that the plaintiff has not sustained that burden as regarding either the fact that it did not learn it until such times as has been testified to by it, or that it has not established by a fair preponderance of the evidence that it took the proper steps to supervise its business and learn of such an accident, then the burden of proof is upon the plaintiff to show that the defendant was not prejudiced by that delay, even though it knew of the accident before it claims.

This matter of burden of proof, as I have instructed you in other cases, means that party upon whom the burden is, as I have instructed you, it is upon the plaintiff to establish its allegations on disputed points by a fair preponderance of the evidence. Preponderance of the evidence means the greater weight **[153]** of evidence, that is that evi-

dence which is of such a character and such an amount and of such a nature as to convince you that it is true, that which so appeals to your reason and understanding and experience as to create and induce belief in your minds in spite of the evidence that opposes it or the arguments that are brought against it.

You are in this case, as in all cases where questions of fact are submitted for the determination of the jury, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility of the witnesses. In passing upon the credibility of the witnesses, you are to take into account, among other things, the appearance of the witnesses who have come before you and testified, whether or not they impressed you as being fair, candid, impartial, trying to tell you the exact truth as they saw it, not keeping back anything or volunteering anything, or whether they impressed you as being evasive, trying to hold something back from you and keep from telling you until they were pressed repeatedly to disclose it, or on the other hand seemed to be too willing or free, running on, trying to inject matter into the case about which nobody asked them, what the law calls swift witnesses. You will also take into consideration the testimony of each of the witnesses, as to whether it is reasonable or not, whether it is a probable story standing by itself, and then consider whether it is probable in connection with the other testimony in the case which you believe. You will also take into consideration the situation each witness was in at the

time about which he has testified as enabling that witness to clearly see or exactly know the things about which he tells you. Also you will take into consideration the interest any witness may have been shown to have in the case, either by reason of the manner in [154] which he gave his testimony as impressing you with that evidence, whether he was unduly interested or by the relation which the witness bears to the case. Mr. Stevens, being an officer of the company,—I do not know whether it is disclosed that he is a stockholder or not,—that is, whether he is a large stockholder or not, but he having testified for the plaintiff, you will apply to his testimony the same test as you do to other witnesses, including his interest in the result of the case. Mr. Coleman, being an officer or an employee of the defendant company, you will apply the same rule to his testimony. A number of witnesses who testified here to material facts in the case, you will take into account, but you will not necessarily be controlled by the number of witnesses, as a single witness may have testified so fully, frankly, fairly and exactly as to create and induce belief in your minds concerning the truth of what that witness testified to as opposed to a number of other witnesses. At the same time the testimony of a number of witnesses, you should take into account, because a number of persons are not so liable to be mistaken as one.

In this case there has been testimony concerning conversations and admissions, oral admissions. The Court instructs you that evidence of that kind should be accepted with great caution by the jury. Es-

pecially is that true where a considerable lapse of time has intervened between the time of these alleged admissions or conversations and the time the witness testified. *On* counsel has pointed out some reasons for that too. In addition to those pointed out by counsel, would be the fallibility of the memory of the witness who undertakes to relate a conversation, as the meaning of persons often depends upon the arrangement of the words. The same words arranged differently often give a different impression, or a word omitted here or [155] substituted there may change the whole meaning of a conversation; therefore, that is why I instruct you that testimony of that kind should be accepted with caution.

Also, if you find that a witness has wilfully testified falsely to any material matter, you are at liberty to disregard the testimony of that witness, except so far as it may be corroborated by other credible testimony in the case.

You will understand that to justify you in doing that, the witness must have wilfully testified falsely to a material matter in the case; that they have wilfully testified falsely to a material matter with the intention of deceiving you, and it does not apply to everything that a witness says. It applies to the material matters in the case. If a witness testifies falsely on some immaterial matter, that does not affect the case one way or the other, you will not be justified in applying that rule.

The Court instructs you that two forms of verdict have been prepared, one finding for the defendant

generally and one finding for the plaintiff. In the latter verdict is a blank in which you will insert the amount that you agree upon if you find for the plaintiff, in which you will insert the amount you arrive at, if you so find. When you arrive at a verdict you will cause which ever one you have agreed upon to be signed by your foreman, to apprise the bailiff of the fact that you have agreed and return into court.

EXCEPTION VIII.

And the defendant, at a former day of the Court and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, requested the Court in writing, to give to the jury Instruction numbered III filed by it, which instruction was in the following language:

"You are instructed, gentlemen of the jury, that if you **[156]** believe from a fair preponderance of the evidence that Mr. Moore was one of the officers of the plaintiff and that it was one of his duties to obtain knowledge of accidents to employees of the plaintiff occurring while in the course of their employment at its warehouse, and if you further believe from a fair preponderance of the evidence that Mr. Moore did not exercise such a personal, reasonable direction, control and supervision over the employees as to render it likely or probable that he himself would obtain knowledge of the accidents to the employees, within a reasonable time after they occurred, and that he took no precautions to obtain such knowledge himself and did not exercise a reasonable degree of care and diligence in the supervision and manage-

ment of the business as would give to him such knowledge, but that he relied and depended on some employee of the Company to give him such information, and if you believe from a fair preponderance of the evidence that this employee had knowledge of the accident to Merrill, for which he recovered damages against the plaintiff, and knew that it occurred at plaintiff's warehouse while he was at work there for it, but that he did not convey such knowledge to the said Moore, or to any officers of the Company, and that by reason of such failure on his part neither Moore nor any of the officers of the plaintiff company had knowledge of the accident until long after it happened, and did not give notice of it to the defendant until more than ten days after this employee's knowledge of it and after he could have informed them of it, then and in such event you are instructed that the plaintiff cannot plead lack of knowledge of the accident as an excuse for a failure to give notice within ten days, according to the terms of the policy."

Which instruction the Court refused and declined to give. [157]

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction and its exception was allowed.

EXCEPTION IX.

And the defendant, at a former day of the Court and before the conclusion of the testimony and within the time fixed by the law and the rules of the

Court, requested the Court in writing to give to the jury Instruction numbered IV filed by it, which instruction was in the following language:

"You are instructed, gentlemen of the jury, that even if you believe from a fair preponderance of the evidence in this case, that none of the officers of the plaintiff corporation knew of the accident to Merrill, yet this does not necessarily show a lack of knowledge on the part of the plaintiff, because the knowledge of some individual other than the officers of the plaintiff might be knowledge of the plaintiff. You are therefore instructed, that if you believe from a fair preponderance of the evidence that Mr. Comstock, the foreman of the plaintiff, superintended and directed the men in the exercise of their work on the premises and personally supervised them while so engaged, and that the character of his duties was such that he would know when the employees in his charge met with accidents, and that he employed and discharged the men and reported their time to the plaintiff; and if you further believe from a fair preponderance of the evidence that the officers of the plaintiff did not personally supervise the work of the men or the men while engaged in it, and did not occupy such a relation or position to the men and their work as would render it reasonably, likely and probable that they would know of the accidents to the men, and if you further believe from a fair preponderance of the evidence that they established no rules or regulations requiring or directing anyone to report to them accidents [158] to the employees while engaged at their work on the premises, and if

you further believe from a fair preponderance of the evidence that none of the officers paid any attention to the question or subject of such accidents to the employees, except one, and that he assumed or was charged by virtue of his position with the duty of knowing of and ascertaining such accidents and reporting them; and if you further believe that this officer gave no directions to anyone else to report accidents to him; established no regulations or rules on the subject, and that he performed such duties and remained in such a place as that it was not reasonably likely or probable that he would know of such accidents, and if you further believe from a fair preponderance of the evidence that this officer relied on the foreman, Mr. Comstock, to report to him such accidents to employees and for this reason made no supervision and took no steps to ascertain about such accidents; and if you further believe that Mr. Comstock, the foreman, knew that Merrill met with the accident while at work for plaintiff at its warehouse, for which he recovered damages against the plaintiff, but that for any reason he failed to inform any of the officers of the plaintiff thereof, and that by reason of his failure to give such notice and information to the said officers, they did not know of it and that they did not give notice thereof until more than thirty days after the accident and after Comstock knew of it, then and in that event you will find that the plaintiff knew of the accident when Comstock knew of it."

Which instruction the Court refused and declined to give.

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction and its exception was allowed. **[159]**

EXCEPTION X.

And the defendant, at a former day of the Court and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, requested the Court in writing to give to the jury Instruction numbered V filed by it, which instruction was in the following language:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case, that the plaintiff did not give notice of the accident to Merrill within the time required by the policy, as explained to you in these instructions, it is not necessary that the defendant should show that it suffered any damage by reason of the failure to give the notice. The difficulty of determining what effect the delay and the failure of the plaintiff to give the notice may have had on the result of the case of Merrill against Stevens, and the difficulty of showing whether the delay in the giving of the notice produced conditions which controlled or affected the decision of the jury in the case of Merrill against the plaintiff, are all presumed in law to have been provided against by the requirement of the policy making the plaintiff's right of action depend on the giving of the notice."

Which instruction the Court refused and declined to give.

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction and its exception was allowed.

EXCEPTION XI.

And the defendant, at a former day of the Court and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, requested the Court in writing to give to the jury Instruction numbered VII filed by it, which instruction was in the following language:

"You are instructed, that if the officers of the plaintiff [160] did not exercise such a supervision over the management of the business and the control of the men and the performance of their work, as would render it reasonably likely or probable that they would know of such an accident to one of the men, and if they did not establish rules or regulations requiring or directing some one else to give them notice or knowledge of such accidents, then you are instructed that the relation of Mr. Comstock, the foreman, to the management of the business and control and supervision of the men, was such that his knowledge of the accident was the knowledge of the plaintiff and that likewise, in his absence, the knowledge of Mr. Bass while acting as foreman of the men in the same manner, was the knowledge of the plaintiff, and particularly is it true that the knowledge of Mr. Comstock was the knowledge of the plaintiff if you believe from a fair preponderance of the evidence that Mr. Moore, one of the officers

of the plaintiff, regarded himself as the proper person to acquire knowledge and give notice of such accidents, and if you believe that this duty was tacitly or expressly left to him by the other officers of the plaintiff and that he took no active steps with regard to the matter of acquiring knowledge of such accidents and established no rules or regulations on the subject, but depended on Mr. Comstock to give to him such knowledge."

Which instruction the Court refused and declined to give.

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction and its exception was allowed.

EXCEPTION XII.

And the defendant, at a former day of the Court and before the conclusion of the testimony and within the time fixed by the law and the rules of the Court, requested the Court in writing, to give to the jury Instruction numbered IX filed by it, which **[161]** instruction was in the following language:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case that Mr. Comstock knew that Merrill had met with an accident while engaged at the warehouse of the plaintiff, in determining the question whether this knowledge is to be treated as knowledge of the plaintiff, it makes no difference how this knowledge was acquired by Comstock. It is not necessary that it should have been acquired

by him, in order to charge the company, while in the course of his duties for the plaintiff. If he actually knew of the accident to Merrill, the question whether he acquired this knowledge while discharging any of his duties as a foreman or employee of the plaintiff, is immaterial."

Which instruction the Court refused and declined to give.

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction and its exception was allowed.

EXCEPTION XIII.

And the defendant, at a former day of the court and before the conclusion of the testimony and within the time fixed by the law and rules of the court, requested the Court in writing to give to the jury Instruction numbered X filed by it, which instruction was in the following language:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence that Comstock bore such a relation to the business of the plaintiff and its supervision, at the time of the injury to Merrill, that the duty devolved on him of reporting accidents to the employees, and if you believe that Stevens and Moore, President and Secretary of the plaintiff, relied on him and depended on him to give such notice, and if you further believe from a fair [162] preponderance of the evidence that the said Comstock did know of the accident, then you are instructed that it makes no

difference whether this knowledge was acquired by him while he was engaged in the discharge of any of his duties as foreman."

Which instruction the Court refused and declined to give.

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction, and its exception was allowed.

EXCEPTION XIV.

And the defendant, at a former day of the court, and before the conclusion of the testimony and within the time fixed by the law and rules of the court, requested the Court in writing to give to the jury Instruction numbered XII filed by it, which instruction was in the following language:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence that Mr. Bass, while he was acting as foreman of the plaintiff, learned in connection with the discharge of his duties as foreman, of the accident to Merrill, at some time during the month of July, and learned that he had met with the accident at the hopper in question in this case, then you are instructed that the knowledge of Mr. Bass under these circumstances was the equivalent of knowledge of the plaintiff, to the extent that the plaintiff cannot claim a lack of knowledge as an excuse for a failure to give the notice under such circumstances."

Which instruction the Court refused and declined to give.

Thereupon, at this time, and before the jury retired and while they were still at the bar, the defendant excepted to the failure and refusal of the Court to give the said instruction, and its exception was allowed. [163]

And thereupon and before the jury retired to consider of its verdict, and while it was still at the bar, the defendant took the following exceptions to the instructions given by the Court, in the language following, to wit:

EXCEPTION XV.

Mr. HOLT.—The defendant excepts to the instruction given by the Court in which the jury were informed that the plaintiff in this case would not be chargeable with any knowledge acquired by its agents unless it was acquired while in the discharge of their duties, this having reference to others than the officers of the company, for the reason that this is an incorrect statement of the law as applied to the facts and testimony in the case; and its exception was allowed.

EXCEPTION XVI.

Mr. HOLT.—Defendant further excepts to the instruction given by the Court in which the jury were informed that under the circumstances stated by the Court in the instruction, the knowledge of an accident acquired by Mr. Comstock while at Mr. Merril's house or at the hospital was not acquired in the discharge of his duty for the reason that this instruction was in effect a comment upon the weight of the testimony and for the reason that it was not a correct instruction, because there was no testi-

mony that Mr. Comstock did acquire any knowledge of the accident at either the house or the hospital, and therefore the instruction was not applicable to the testimony and was calculated to create the impression on the jury that in the mind of the Court that the testimony which was given on that subject was of such a character and calculated to mislead the jury; and its exception was allowed.

EXCEPTION XVII.

Mr. HOLT.—Defendant excepts to the instruction of the Court in [164] its statement of the issues in this case in which it informed the jury that if the defendant was not damaged by the failure to give notice within the time fixed in the policy, that the failure to give notice would not defeat the plaintiff's action; and its exception was allowed.

EXCEPTION XVIII.

Defendant objects to the instruction informing the jury that if the defense might have been made successfully by the defendant, notwithstanding the fact that the witnesses may have scattered or that alterations may have been made in the premises or appliances, the failure of the plaintiff to give notice within the time required by the policy would not defeat this action; and its exception was allowed.

EXCEPTION XIX.

Defendant excepts to the instruction which informed the jury that unless the defendant would have been embarrassed or injured in the defending of the action by the failure of the plaintiff to give notice within the time fixed in the policy would not defeat its action. The language I could not remem-

ber, of course; and its exception was allowed.

The COURT.—The Court stated the proposition both "positively and negatively."

EXCEPTION XX.

Mr. HOLT.—Defendant excepts to the giving of this instruction for the reason that it is an incorrect statement of the law for the reason that if the notice was not given within the time fixed by the policy it makes no difference whether the defendant would have been damaged or hindered or interfered with in making a defense. The law conclusively presumes a damage from the giving of the notice, a condition precedent to the recovery on the policy.

The COURT.—The Court ruled with you that way once. Exception allowed. [165]

EXCEPTION XXI.

Mr. HOLT.—Defendant excepts to the instruction given by the Court calling attention to the testimony detailing admissions and conversations in which the jury were instructed that they should receive such testimony with caution because it is an instruction commenting on the weight of the evidence, because it is incorrect as a statement of law, because the true rule is that the testimony relates to such admissions or declarations is as convincing as other testimony, it should have the same force and effect. There is no difference between the two classes of testimony indicated; and its exception was allowed.

EXCEPTION XXII.

Defendant further excepts to the instruction for the reason that in it the Court alluded to the fact

that one counsel in his argument had given reasons why such testimony should be received with great caution, and that, inasmuch as this was one of the counsel for the plaintiff and the only testimony of this character was given in behalf of the defendant, this instruction affected the weight of the testimony of the defendant on this subject and gave a certain amount of sanction and approval to the argument of the attorney for the plaintiff thereon.

EXCEPTION XXIII.

Mr. HOLT.—Defendant further excepts to the instruction on this subject for the reason that during the course of it the Court instructed the jury that the Answer of the defendant set forth that the accident occurred on or about the 19th day of July, for the reason that it was an incorrect statement of the issues, because the Answer to the Amended Complaint alleged that the accident occurred on or before the 19th of July. I do not know whether that is material or not, but I noted it; and its exception was allowed. [166]

[Order Certifying, Approving and Allowing Bill of Exceptions.]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1739–C.

JOHN B. STEVENS & COMPANY, a Corporation,
Plaintiff,

vs.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,

Defendant.

United States of America,
Western District of Washington,
Southern Division,—ss.

I, E. E. CUSHMAN, Judge of the District Court of the United States, Western District of Washington, in the Southern Division, being the Judge before whom the above-entitled action was tried, do hereby certify that the above, foregoing and annexed Bill of Exceptions in the above-entitled action contains a true and correct record of all the matters and proceedings occurring in the said cause; that the same is a true and correct Bill of Exceptions therein and the same is hereby certified, approved and allowed this 5th day of March, 1914.

EDWARD E. CUSHMAN,
Judge.

(Filed Mar. 5, 1914.) [167]

Writ of Error [Copy].

The President of the United States, to the Honorable Judges of the United States District Court, for the Western District of Washington, Southern Division, Greeting:

Because in the record and rendition of a judgment in the above-entitled court before you, on January 2, 1914, for Six Thousand Seven Hundred Sixty-six and 88/100 ($6,766.88) Dollars, in a

cause wherein John B. Stevens & Company, a corporation, is plaintiff, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, is defendant, manifest error hath happened to the injury of the defendant, and we being willing that the said error should be corrected and justice done to the said defendant, do command you, under your seal, to send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, in the said Circuit Court of Appeals, in thirty days from the date of this writ, to wit, on or before the 4th day of April, 1914, so that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and the custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 5th day of March, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal of Court] FRANK L. CROSBY,
Clerk of the District Court of the United States for the Western District of Washington, Southern Division. [168]

By E. C. Ellington,
Deputy.

The bond having been approved the foregoing writ is allowed.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

Service of the within and foregoing as well as the assignment of errors and bond by receipt of true copies thereof, is hereby admitted this 5th day of March, 1914.

J. W. QUICK and
L. B. da PONTE,

Attorneys for John B. Stevens & Company, a Corporation, Plaintiff.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 5, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [169]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,

Defendant in Error.

Citation on Writ of Error [Copy].

United States of America,

The President of the United States of America to John B. Stevens & Company, a Corporation, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the courtroom of said Court, in the city of San Francisco, in the State of California, within thirty days after the date of this citation, to wit, on the 4th day of April, 1914, pursuant to the writ of error filed in the office of the Clerk of the District Court of the United States, for the Western District of Washington, Southern Division, wherein The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation is defendant and you are plaintiff, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 5th day of March, 1914. [170]

[Seal of Court] EDWARD E. CUSHMAN,

Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

Service of the within and foregoing Citation and Writ of Error therein mentioned and the receipt of

true copies thereof is hereby admitted this 5 day of March, 1914.

J. W. QUICK and
L. B. da PONTE,
Attorneys for John B. Stevens & Company, Defendant in Error.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 5, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [171]

[Cetificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of John B. Stevens and Company vs. Frankfort Marine, Accident & Plate Glass Insurance Company, No. 1739–C, lately pending in this court, as required by the stipulation of counsel filed herein.

I hereto attach and herewith transmit the original Writs of Error and Citation in this case;

I further certify and return that the cost of certifying and making the foregoing record amounts to the sum of $126.70, which amount has been paid to me by the attorneys for the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set

my hand and the seal of this Court, at Tacoma, this first day of April, A. D. 1914.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. [172]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1739–C.

JOHN B. STEVENS & COMPANY, a Corporation,
Plaintiff,

vs.

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,
Defendant.

Writ of Error [Original].

The President of the United States, to the Honorable Judges of the United States District Court, for the Western District of Washington, Southern Division, Greeting:

Because in the record and rendition of a judgment in the above-entitled court before you, on January 2, 1914, for Six Thousand Seven Hundred Sixty-six and 88/100 ($6,766.88) Dollars, in a cause wherein John B. Stevens & Company, a corporation, is plaintiff, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, is defendant, manifest error hath happened to the injury of

the defendant, and we being willing that the said error should be corrected and justice done to the said defendant, do command you, under your seal, to send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, in the said Circuit Court of Appeals, in thirty days from the date of this writ, to wit, on or before the 4th day of April, 1914, so that the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error, what of right and according to law and the custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 5th day of March, in the year of our Lord One Thousand Nine Hundred and Fourteen.

[Seal] FRANK L. CROSBY,
Clerk of the District Court of the United States, for the Western District of Washington, Southern Division.

By E. C. Ellington,
Deputy.

The bond having been approved the foregoing writ is allowed.

EDWARD E. CUSHMAN,
Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

Service of the within and foregoing, as well as the

assignment of errors and bond by receipt of true copies thereof, is hereby admitted this 5th day of March, 1914.

J. W. QUICK and
L. B. da PONTE,
Attorneys for John B. Stevens & Company, a Corporation, Plaintiff.

[Endorsed]: No. 1739–C. In the United States District Court, Western District of Washington. Jno. B. Stevens & Co., a Corporation, Plaintiff, vs. The Frankfort Marine etc. Ins. Co., a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 5, 1914 Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a Corporation,
Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,
Defendant in Error.

Citation on Writ of Error [Original].

United States of America.

The President of the United States of America to John B. Stevens & Company, a Corporation, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, at the courtroom of said Court, in the city of San Francisco, in the State of California, within thirty days after the date of this citation, to-wit: on the 4th day of April, 1914, pursuant to the writ of error filed in the office of the Clerk of the District Court of the United States, for the Western District of Washington, Southern Division, wherein The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation is defendant and you are plaintiff, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 5th day of March, 1914.

[Seal] EDWARD E. CUSHMAN,

Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

Service of the within and foregoing Citation and Writ of Error therein mentioned and the receipt of

true copies thereof is hereby admitted this 5th day of March, 1914.

J. W. QUICK and
L. B. da PONTE,
Attorneys for John B. Stevens & Company, Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the 9th Circuit. The Frankfort Marine, etc. Ins. Co., a Corporation, Pltff. in Error, vs. Jno. B. Stevens & Co., a Corporation, Deft. in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Mar. 5, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2397. United States Circuit Court of Appeals for the Ninth Circuit. The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error, vs. John B. Stevens & Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received and filed April 2, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.